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REPORTS OF CASES

Adjudged in the
Court of King's Bench;

TOGETHER WITH

Several Special CASES adjudged in the
Courts of *Chancery*, *Common Pleas*, and *Exchequer*; from
the Revolution to the Tenth Year of Q. ANNE.

By *WILLIAM SALKELD*,
Late Serjeant at LAW.

With Two Tables; the one of the Names of the Cases, the
other of the Principal Matters therein contained.

V O L. III.

*Printed from the Original Manuscript, writ-
ten by himself.*

In the *SAVOR*:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer Esq;*) for R. Gosling at the *Middle-Temple-Gate* in *Fleet-street*; and T. Ward in the *Inner-Temple-Lane*.

M DCC XXIV.

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T H E
P R E F A C E.

SINCE the former Volumes of Mr. Serjeant Salkeld's Reports were published with the Approbation of the most eminent Professors of the Law, it may not be improper to inform the Reader, that the following Cases were undoubtedly collected by the same Hand.

This will be very evident to those who read and compare them with the former, because the same Judgment and Perspicuity runs through the Whole; and as an indubitable Proof, that these Cases are Genuine, the Original Manuscript, from whence they were transcribed, written by the Author's own Hand, is now in the Possession of the Editors, and may be seen by any Person that desires it.

This Volume contains more than Four hundred and forty Cases, and altho' the Names of some of them have been already printed, yet they are only the Names, and not the Matter, since the Arguments both
2 of

The P R E F A C E.

of the Bench and at the Bar are generally new; and in all of them some new Matter is added, which renders this Collection a proper Supplement to those that have been already printed.

There are likewise some Cases abridged in the following Collection, which may be found more at Large in the Cotemporary Reports; but even these may be of some Use, because they are placed under proper Titles, in Imitation of Rolle's Abridgment; and it may reasonably be presumed, that the learned Serjeant would not have abridged any Cases but those that were suitable to such Titles, and very well worthy of Observation.

And since Orders made by Justices of Peace, concerning the Removal and Settlement of the Poor, have of late made a considerable Title in the Law, and since it appears by the Author's former Reports, that he took particular Care to State the Resolutions of the Judges in such Cases, the Reader will find in this Volume several Judgments in Cases of that Nature, and those digested under proper Titles, which were never yet printed in any Book of Reports whatsoever.

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ABATEMENT.

Anonymus. Mich. 4 Annæ.

AN Administrator brought an Action of Debt on a Bond, the Defendant pleaded in Abatement, that Administration was granted to another, and upon a Demurrer it was insisted, that tho' this is Matter in Bar, yet it might be pleaded in Abatement; for so it is in the Case of Outlawry and Property, which may be pleaded either in Bar or in Abatement: But per Holt, Ch. Just. it was ruled, that the Defendant should answer over, for Matter in Bar must not be pleaded in Abatement.

Matter in Bar may be pleaded in Abatement.

Kemp *versus* Andrews. Mich. 2 Will. III. B. R.
Rot. 289.

IN Trover and Conversion, the Plaintiff declared, that he, together with A. and B. both now dead, and whom he survived, being possessed of a Ship and Goods lost them, and that the Defendant found and converted them to his own Use, who pleaded in Bar to the Action, that the said A. and B. made their Wills in Writing, and thereby appointed several Executors and died, and they in their Life-time, together with the Plaintiff, were possessed of this Ship and Goods as Merchants, and that there is no Survivorship between Merchants, and so concludes in Bar; and upon Demurrer to this Plea it was adjudged ill in Bar, but it had been a good Plea in Abatement.

3 Lev. 290.
Where a Plea is ill in Bar, but good in Abatement.

ABILITY and DISABILITY.

Anonymus. Mich. 2 Annæ.

A Woman
may execute
an Office by
her self or
by Deputy.

A Woman was appointed by the Justices to be Governess of a Work-house at Chelmsford, and M^r. Parker moved to quash the Order, because it was in the Nature of an House of Correction, and so the Office was not suitable to her Sex: But per Powell and the rest, absente Holt Ch. Just. 'tis a good Appointment, and she may be capable of executing the Office either by her self or Deputy, as the Lady Broughton did, who was appointed Keeper of the Gatehouse at Westminster.

ACCEPTANCE.

Where the
Title is to a
Thing in
Gross, a Man
is not bound
to accept it
by Parcels.

Adjudged, that where a Man is entitled to a Thing in Gross, he is not bound to accept it by Parcels; as for Instance, if A. be bound to deliver a Tun of Wine to B. and tenders Part of it, B. is not bound to accept it.

Lessor is not
bound to ac-
cept Part of
the Rent.

So where the Lessor distrains for Rent in arrear, and the Lessee tenders Part of it, the Lessor is not bound to accept it; but if he distrain for Arrears due at several Days, on which it ought to be paid, and the Lessee tenders the Arrears due on such a Day, the Lessor is bound to accept it. The Case is the same if the Lessor bring an Action of Debt instead of distraining for the Rent due on several Days, but if there is no Tender of any Part, and the Lessor get Judgment for the Whole, 'tis now become an entire Duty, and if upon Execution sued out the Lessee tenders any Part of it, the Lessee is not bound to accept.

In Detinue
the Plaintiff
is not bound
to accept
Part

So in Detinue for divers Parcels of Goods, if the Plaintiff get Judgment for the Whole, and after Execution taken forth the Defendant tenders some Part to the Plaintiff, he is not bound to accept it.

Lease for Years, rendering Rent, *Proviso* to be forfeited if the Lessee aliened or assigned to another; the Lessee aliened, and the Executor of the Alienee paid the Rent to the Lessor, and tho' it was not alledged, that he did know the Lease was * aliened, (viz.) by Assignment to another, but only that he (the Lessor) knowing the other to be the Executor of the Assignee, had accepted the Rent of him; it was adjudged he should not enter for a Forfeiture against his own † Acceptance, for it shall be intended he had Notice of the Assignment, if the contrary doth not appear. See ** *Whitchcot's Case*.

No Entry for a Forfeiture after Acceptance of the Rent.
* See 3 Rep. *Pennant's Case*.
Cro. Eliz. 453.
Moor 456.
S. C.
† 2 Bullst. 151.
Cro. Eliz. 715.
** 2 Cro. 398.
1 Roll. Rep. 389.

So if the Lessee covenant for him and his Assigns to repair, the Assignee of the Lessee by his accepting such Assignment is liable, for this is a Covenant which runs with the Land.

The Husband and Wife made a Lease of the Lands of the Wife, then the Husband died, and the Wife married again, and this second Husband accepted the Rent. Adjudged, that by such Acceptance he had affirmed the Lease, even quoad the Wife her self, because she had resigned her Election to her second Husband, and he by his Acceptance of the Rent had affirmed the Lease.

Dyer 195.
Rolls 475.

Lease to W. R. for Life, rendering Rent at Michaelmas, with a Clause of Re-entry for Non-payment, the Rent was in Arrear, and afterwards the Lessor brought an Action for the Rent. Adjudged, that notwithstanding this Action he (the Lessor) might still enter for a Breach of the Condition, for the Action for the Rent did not affirm the Lease, because it shall be intended to be brought as for a Duty due upon the Contract; but if he had distrained for the Rent not being paid on the Day, then he can never afterwards enter for a Breach of the Condition, because the Distress affirms the Continuance of the Lease.

1 Inst. 211.
1 Leon. 262.

A Gift was made to the Husband and Wife, and to the Heirs of their Bodies, they afterwards made a Lease of the Lands, reserving Rent on such a Day, with a Clause of Re-entry, then the Husband died, and the Rent being in Arrear the Issue in Tail accepted it. Adjudged, that this was no Affirmance of the Lease as to himself, because the Rent was not due to him whilst his Mother was living; but it had been otherwise, if he had accepted it after her Death.

3 Rep. 64.
Where Acceptance of the Rent is no Affirmance of the Lease.

Adjudged, That an Acceptance of a collateral Thing is no Bar to a Title of Freehold, and that an Acceptance of Rent after the Day of Payment will not bar a Right of Entry vested by Non payment, because the Rent being a Duty, and owing, the

Acceptance of Rent after the Day of Payment no Bar to a Right of Entry.

the Party might well accept it; but 'tis otherwise after a Distress taken, or if the Rent is accepted at another Day subsequent, for this affirms the Continuance of the Lease.

Anonymus.

Acceptance
of Rent will
not make a
Lease good.

LEASE for Years upon Condition to be void, if the Lessee assigns over the Term; he afterwards made an Assignment, and the Lessor knowing it accepted the Rent. Adjudged, this will not make the Lease good, because it was absolutely void before the Acceptance.

Smith *versus* Arnold.

* Cap. 34.
Assignee is
liable to all
Covenants
which run
with the
Land.

† 1 Salk. 199.

** 2 Cro. 125.
Godb. 69.
5 Rep. 24.
Moor 399.

THE Statute * 32 H. 8. enables a Grantee of a Reversion to enter for a Condition broken, and to bring an Action of Covenant, &c. The Case was, Lessee for Life covenants for himself, his Executors and Administrators, to † build an Out-house on the Lands of the Lessor, and afterwards the Lessee for Life assigns his Estate to T. S. The Question was, whether such Assignee might be charged in an Action of Covenant, if the Out-house was not built? It was insisted, that he could not, because the Assignor had covenanted only for himself, his Executors and Administrators, leaving out the Word Assignes, which is very true: But adjudged, that the Assignee by the ** Acceptance of the Possession of the Lands, had made himself subject to all the Covenants which run with the Land, of which Repairing is one, Building is another, and to such he is bound without being named by that special Word Assignes, but not to any collateral Covenants.

Wallis *versus* Wood.

When Part of
the Rent be-
came due,
pending an
Action a-
gainst an Ad-
ministrator.

LEASE for Years was made to T. S. rendering Rent, which being in Arrear the Lessee died Intestate, and Administration was granted to the Defendant, against whom an Action of Debt was brought for the Rent, who pleaded, that the Intestate had assigned the Term, and that after such Assignment the Lessor had accepted Rent of the Assignee. The Parties were at Issue upon the Acceptance of the Rent, and the Plaintiff had a Verdict; but because Part of the Rent became due, pending the Action, the Plaintiff could never get Judgment.

Parker versus Webb.

THE Case was, the Lessor being seised in Fee, made a Lease of the Lands for Years to the Defendant, rendering Rent at Michaelmas and Lady-Day, in which Lease the Defendant covenanted to pay the Rent, &c. afterwards the Lessor granted the Reversion to the Plaintiff, to which Grant the Defendant attorned, and an Action of Covenant being brought against him for Non-payment of Rent, he pleaded, that he had assigned his Term to D. D. before the Grant of the Reversion made to the Plaintiff, and upon a Demurrer to this Plea, per Holt Ch. Just. 'tis ill; for he ought to have set forth, that the Plaintiff had accepted Rent from the Assignee, or that he had Notice of the Assignment; but if that had been pleaded, the Plaintiff should still have Judgment, because he, being Grantee of the Reversion, may maintain this Action against the Lessee, even after the Assignment of the Term, and tho' he had accepted the Rent after such Assignment; and this he might do upon the express Covenant of the Lessee to pay it, which is a Covenant that runs with the Land.

Grantee of a Reversion may have Covenant after the Assignment of the Term.

ACTION in GENERAL.

ADjudged, that a Scire Facias, or any Writ to which the Defendant may plead, is an Action, or by which a Plaintiff may recover. 6 Rep. Fine's Case.

In Personal Actions, if the Plaintiff is barred, as in an Action of Debt or Accompt, he can never bring the same Action again, nor hath he any Remedy but by Writ of Error, or Attainting the Jury.

But in Real Actions, if the Plaintiff is barred he may resort to a higher Remedy; as if he is barred in an Assise he may bring a Mortancestor; if in a Formedon in Descender, he may bring a Formedon in Reverter or Remainder.

If a Man recover in Trespas he shall not afterwards have Mayhem, for 'tis to get the same Recompence again; but he may have an Appeal of Robbery, because the Judgment is not for Damages, but against the Life of the Defendant. 4 Rep. 43. Moor pl. 416. Hudson's Case.

Where

1 Cro. 75.
Yelv. 67.

Where two are bound jointly and severally in a Bond, and the Obligee gets Judgment against one and takes him in Execution, yet he may proceed against the other, because the Debt is not paid or satisfied.

And so he may, if the Sheriff suffer him, whom he had in Execution, to Escape.

One promises to pay W. R. 40 l. (viz.) 10 l. on such a Day, and so on till all is paid; an Action lies upon the first Failure of Payment.

So 'tis in * Covenant, and so 'tis in a Recognizance.

* Cro. Eliz.
118.

1 Cro. 241.
1 Inst. 292.

Owen 42.

1 Cro. 241.

2 Saund. 337.

But if a Bond of 40 l. is given conditioned to pay (viz.) 10 l. on such a Day and so on, Debt will not lie till the last Day.

But if the Bond is to pay 20 l. on such a Day, and 20 l. on such a Day, there Debt will lie upon the first Failure; therefore there is a Difference where a Bond is to pay 40 l. (viz.) 10 l. on such a Day, and so on, and where 'tis to pay 20 l. on such a Day, and 20 l. more on such a Day, because in the Case of the videlicet, tho' the Duty is intire, the videlicet divides the Parcels.

But where a Man is bound in a Bond to pay 100 l. (viz.) 50 l. on such a Day, and 50 l. on such a Day, Debt lies upon the first Failure, because the Condition is broken.

Cro. Eliz.
68, 110.

Where it appears upon the Record, that the Action is brought before the Cause of Action arises, either in the Declaration or in the Verdict, or otherwise by the Plaintiff's own Shewing, he shall never recover; but where it is a Matter alledged by the Defendant, but not insisted on, so that Issue is taken upon another Point, and the Truth of the Fact alledged doth not appear, there the Plaintiff shall have Judgment, if he recover.

ACTION POPULAR.

ADjudged, that the King has no Privilege in an Action qui tam pro Domino Rege, &c. and that the Prosecutor may pray a Tales without the Consent of the Attorney General, and he may be Nonsuit.

Et per Holt, Ch. Just. Where a certain Penalty is given by a Statute to the Party grieved he needs not join the King, for 'tis like a private Act, only for his Benefit.

But it lies for * Inducing a Man in a Foreign Country; it lies for a † Scandalum Magnatum, for the King is prejudiced by the Act, which is the Ground of the Action.

It lies against the Sheriff if one taken upon a Capias Utlagatum escape, or against the Rescuer, if he be rescued; but the Plaintiff is not bound to bring it in Tam quam, &c. but may bring Debt alone in his own Name. Et nota, In these Cases, tho' the Action is in the Tam quam, the Party shall have all the Damages; but in some Cases, as upon the Statute of Hue and Cry, and the Statute for not appearing as a Witness, being served with a Subpoena, the Party may either bring Debt or Case; if he bring Debt, he must sue without the King, for the Debt is not due to him, but to the Party grieved; but if he bring an Action on the Case, he must sue in the Tam quam, for the Action is founded on the Tort only, and that is to the King as well as to the Party, per Holt, Ch. Just.

Nota, The following Rule was made by the Court in January 1682. That all Clerks of the Assise and Associates do return the *Posteas* in all Popular Actions and Informations Qui tam, &c. into the respective Offices from whence they issue, and to receive their Fees for the returning thereof at the Trial from the Party, for whom the Verdict shall be given, and that the Masters of the respective Offices, to whom the said *Posteas* shall be returned by the Clerks of Assise shall send a Note into the Exchequer to the Clerks of the Estreats, that the Sheriffs of the respective Counties may be charged with the same.

* Rast. Eng. 433.
† Rast. Eng. 126, 193.
Roll. Abr. 1. 2 Cro. 361, 629.
Bridgm. 8.
1 Roll. Rep. 78.

Raym. 479.
S. C.
Clerks of Assise to return the *Posteas* in all Popular Actions.

ACTIONS on the CASE.

*Good and not good, where brought before
the Time of Action.*

Rogers *versus* Rearsby. Pasch. 2 Annæ.

The Effoin-
Day was the
Day in which
the Demise
was laid, and
good.

* 1 And. 240.

IN Ejectment, the Demise was laid on the 20th Day of October; upon Not guilty pleaded, the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, That the * Effoin-day, which in the Law is accounted the first Day of the Term, was on the same 20th Day of October, on which the Demise was laid, and so this Ejectment was brought by the Plaintiff before he had any Cause of Action; but this Objection was not allowed, for per Curiam, the Action and the Wrong may be upon one and the same Day, and this being by Original may be sued out after the Commencement of the Term, and returned, especially in so long a Term as Michaelmas Term is; but admitting it to be a Slip, the Defendant should have taken Advantage of it upon Oyer.

Blackhall *versus* Evans. Mich. 3. Georgii.

Battery laid
to be done
on a Day not
yet come.
† 1 Lev. 299.

** Hob. 189,
245, 277.
S. P.

†† Cro. Eliz.
68, 110. ad.
Raym. 463.

IN Assault and Battery, upon Not guilty pleaded the Plaintiff had a Verdict; it was objected in Arrest of Judgment, That the Battery was laid to be committed on a Day † not come when the Verdict was given; but this Objection was disallowed, because it being impossible it should be committed after the Verdict was given, 'tis as if no Time at all had been laid in the Declaration, for an * impossible Time is no Time, and in such Case it can never be intended that the Jury gave Damages for a Battery which was not then done: 'Tis true, if the Plaintiff had laid a Time after the Action and before the Verdict, the Damages must be intended to be given for the Battery then done, that is, at the Time of the Action brought; but that ought not to be, †† because at that Time the Plaintiff had no Cause of Action.

Smith

Smith versus Westhal.

By the Statute of * Frauds, &c. 'tis enacted, That no Action shall be brought upon any Agreement, which is not to be performed within a Year after the making thereof, unless there be a Memorandum of the Agreement in Writing, and signed by him who is to be charged therewith. An Agreement was made, that in Consideration of 5 l. paid by the Plaintiff to the Defendant, he (the Defendant) promised to pay the Plaintiff 10 l. upon his Day of Marriage, which happened about 9 Years after this Agreement; and now an Action being brought upon this Promise, it was adjudged, that a Memorandum in Writing was not necessary in this Case, because the Marriage might have happened within a Year after the Agreement made.

* 29 Car. 2. cap. 3. Par. 17. Where a Memorandum in Writing is not necessary. See postea Bourkmire v. Darnell.

Sawen versus Hulbert.

IN Trover the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, that the Declaration was ill; because the Conversion was laid on a Day certain in Michaelmas Term, and the Declaration was General as of that very Term without a Day certain; as Memorandum, that on such a Day, and therefore it must relate to the first Day of that Term, and if so, then this Action was brought before the Plaintiff had any Cause of Action, because it was brought as the first Day of the Term, and the Conversion, which is the Foundation of the Action, was laid in the Declaration to be after the Term began. But per Holt, Ch. Just. 'Tis well enough, if the Bill was filed after the Cause of Action accrued, for there was no Action depending till that very Time, and the filing the Bill was on a Day certain.

In Trover, the Declaration was General, as of Michaelmas Term, and the Conversion was laid on a Day certain in that Term, and yet good.

For Malefeasance, Misfeasance and Negligence.

Keeble versus Hickeringhall.

CASE, &c. in which the Plaintiff declared, that he was possessed of a Decoy Pond frequented with Ducks, of which he made great Gains, and that the Defendant knowing and maliciously intending to deprive him (the Plaintiff) of the Use and Benefit of his said Decoy Pond, did on such a Day and Place, at one Time, discharge and shoot of six Guns, and at another Time 4 Guns,

Case lies where the Plaintiff had a Possession without any Property.

Guns, to fright away his Ducks, &c. upon Not guilty pleaded the Plaintiff had a Verdict; 'twas objected in Arrest of Judgment, That the Defendant stood on his own Ground, and so could not be guilty of a Trespass in the Close of the Plaintiff; besides, the Declaration is ill; for the Plaintiff did not set forth, how many Ducks were frightened away, or if he had, it had been ill, because being Wild-Ducks, he had no Property in them. Holt, Ch. Just. A Decoy Pond is a Kind of Trade, and of great Profit to the Owner, and by the same Reason that an Action will lie for malicious Words spoken by one Tradesman of another, it will lie for a malicious Act done by one to another, for in both Cases 'tis prejudicial to the Plaintiff. If one Man keeps a School in such a Place, another may do so likewise in the same Place, tho' he draw away the Scholars from the other School, 'tis true, this is damnum, but 'tis absque injuria; but he must not shoot Guns at the Scholars of the other School, to fright them from coming there any more. And as to the other Objection, the Plaintiff needs not shew how many Ducks were frightened, because 'tis impossible for him to do it, and tho' they were Wild, yet they were fluminea volucres, and in the Plaintiff's Decoy Pond, and so in his Possession, which is sufficient, without shewing that he had any Property in them.

Wheeler versus Baker. Mich. 8 Guilielmi.

Where the whole Term was assigned by Parol, the Assignor cannot have an Action, because he hath no Residuary Interest.

LESSEE of an House for 3 Years, Assigns it to W. R. for 3 Years by Parol; the House was afterwards burnt, and the Assignor brought an Action on the Case against the Assignee for Damages. Adjudged that it would not lie, because he had no Residuary Interest in the House, neither is he liable over to the first Lessor, because the Assignment was lawful: The Case had been the same, if he (the Plaintiff) had demised to W. R. for 5 Years, for this would only have amounted to an Assignment of his Term, so that he gains no Reversion by it; 'tis true, it had been otherwise, if the Lease had been by Indenture or Estoppel; but if the Lessee had assigned for two Years, he might have an Action against W. R. the Assignee, because there was a Reversion in him (the Lessee) and in such Case 'tis always necessary for him to declare, that he had an Interest ad tunc ventur' (viz.) when the House was burnt. But this Action is now taken away by the Statute * 6 Annæ, by which 'tis enacted, That no Action shall be maintained against any one in whose House or Chamber any Fire shall accidentally begin; and if any Action shall be brought, the Defendant may plead the General Issue, and give this Act in Evidence, and if the Plaintiff be Nonsuit, discontinue, or a Verdict be against him, the Defendant shall have treble Costs. proviso, that nothing therein shall make void any Agreement between Landlord and Tenant.

* 6 Annæ cap. 51.

This Act was only Temporary for 3 Years; but by another Statute Anno * 10 Annæ, this Clause was made Perpetual.

* 10 Annæ.
cap. 14.

Coggs *versus* Bernard. Trin. 2 Annæ. 2 Salk. 733.
the Pleadings.

IN an Action on the Case against the Defendant, for his Negligence in performing what he had undertaken to do; there was a Verdict for the Plaintiff, and it being objected in Arrest of Judgment, That in this Case there was no Consideration to entitle the Plaintiff to an Action, for the Defendant was to have no Reward; and it did not appear, that he was a Common Carrier or Porter, so that by Custom or Usage he might lawfully claim a Reward. Holt, Ch. Just. in arguing this Matter, declared, That if the Agreement had been only Executory (i. e.) if the Defendant had assumed to take up the Hoghead of Brandy out of one Cellar, and lay it down in another (which was this Case) and had not done it, this Action would not have laid against him, like the Case in 11 H. 4. 33. when the Action was brought against the Defendant, upon a Promise to build an House for the Plaintiff, by such a Day, which he had not done; it was held, that the Action would not lie, for the Reason before mentioned; but that differs from the principal Case, because the Defendant had actually entered upon the Performance of the Thing which he had promised to perform, and the Plaintiff relying on the Defendant's Promise, had trusted him to do it, who by his Negligence had deceived him, and 'tis the Deceit which is the Ground of this Action; 'tis true, the Defendant was not bound to enter upon this Trust, but if he doth, he must take Care that the Plaintiff be not damaged by his Neglect. He admitted, That there was a contrary Resolution * in Yelv. (viz.) That if W. R. deliver Goods to L. R. and in Consideration thereof he promise to redeliver them, yet no Action will lie against him, if he doth not redeliver them; which Resolution is not Law. That in † 2 Cro. it was otherwise resolved (viz.) where Money was delivered to one to pay over to another sine mora. Adjudged, That an Action would lie against the Defendant, if he did not pay it over; for tho' he had no Benefit by this Undertaking, yet, if he take the Trust upon him, he is bound to perform it. See 3 H. 6. 36. Owen 141. Keilw. 160. He likewise held, That where a Man carrying Goods is of a publick Employment; as a Carrier, Wharfinger, Hoy-man, or Master of a Ship, he must answer all Events, excepting only the Acts of God, and the Enemies of the King, and that this is a Politick Establishment, for the Safety of all Persons concerned, and whose Affairs necessitate them to intrust such Carriers; for by this Means all private Combinations between them and

1 Salk. 26.
Case lies
against
the Defen-
dant, where
he enters on
a Thing a-
greed on,
and doth not
perform it.

* Yelv. 128.

† 2 Cro. 667.

Highwaymen, and other Robbers, are prevented, which cannot easily be discovered. But if a Bailiff or Factor carries Goods, and is robbed, he is not liable to the Owner, tho' he hath a Premium, because 'tis only a particular Office, and a private Trust; he doth the best he can, and it would be unreasonable to charge him with a Trust farther than the Nature of the Thing puts it in his Power to perform. The same Law of a Factor; therefore if he is robbed, he shall not be chargeable, for 'tis sufficient, if he takes the same Care that the Owner himself would have done. But where Goods are delivered to be carried gratis or to do any Thing about them, without any Reward, which is called by Bracton * Mandatum, and in English, acting by Commission; this also obliges him to a diligent Management and Care of the Goods which is implied in the very Undertaking; and tho' the Trust was Voluntary, yet by the Breach thereof, a Fraud is put upon the Deliverer, which is a sufficient Ground to support this Action.

* Lib. 3. 100.

Bird versus Stroud. Trin. 8 Will. III. B. R.

Where the Action is grounded on the Possession, the Plaintiff needs not shew a Title.

CASE, &c. in which the Plaintiff declared, That he being possessed of a Tenement (to which he had and ought to have a Way) and to which he had, and ought to have Common of Pasture in D. the Defendant had digged Coney-Boroughs there per quod, &c. Upon Demurrer to this Declaration, the Defendant had Judgment in C. B. and now upon a Writ of Error in B. R. that Judgment was affirmed: The Objection was, That the Plaintiff had not shewed any Title to this Common, either by Grant or Prescription, and adjudged he need not, because the Action is grounded upon the * Possession, and it doth not appear but that the Defendant is a meer Stranger; besides the Title is not Traversable, but to be given in Evidence upon the Trial of the Issue.

* 2 Cro. 43, 122.
Cro. Car.
Sands versus Tresus.
1 Vent. 356.
S. P.

Buxentine versus Sharp. Pasch. 8 Will. III.

Action will not lie for keeping a Mad Bull without saying *sciens*.

THE Plaintiff declared, That the Defendant kept a Bull, which used to run at Men, but did not say *sciens* or *scienter*; and this was adjudged ill after a Verdict, because the Action will not lie, unless the Owner knew the Quality of his Bull, and it cannot be intended that this was proved at the Trial, because the Plaintiff is not bound to prove more than is laid in his Declaration.

Jenkins *versus* Turner.

THE Plaintiff declared, That the Defendant kept a Boar, ad mordendum animalia consuet', and that he knew of this Quality; after a Verdict for the Plaintiff, and a Motion in Arrest of Judgment, this Declaration was held good, tho' it was objected, that Animalia mentioned in the Declaration might be Frogs; for it shall be intended the Proof at the Trial was, that this Boar bit such Animals as will support the Action, otherwise the Jury would not have found a Verdict for the Plaintiff, and have given Damages. There was another Objection to this Declaration (viz.) That the Defendant cannot know what Animals he is to defend against; but it was answered, no Evidence could be given of killing or biting any Animals but of such of which he had Notice.

Case against the Defendant for keeping a Boar which used to bite Animalia, not saying what Animals, good.

Crowther *versus* Oldfield. Pasch. 2. Annæ Rot.
233. B. R.

CASE, &c. for disturbing him in his Common, in which the Plaintiff declared, That he was seised of a Messuage, &c. Parcel of the Manor of W. Tent' per Copiam rotulorum Curie ejusdem manerii ut tenen' Customarius in feodo simplici secundu' consuetudinem Manerii, and that he and all the Tenants of the said Manor, had Time out of Mind Common on the Wastes of the said Manor, for all Beasts Levant and Couchant upon their Copyholds. This Declaration was adjudged ill, after a Verdict which had found it to be Parcel of the Manor, as the Plaintiff had set forth in his Declaration, because the Words ad voluntatem Domini being left out, it doth not appear to be Copyhold; so that taking it to be Freehold and not Copyhold, then the Prescription should have been by a Que Estate at Common Law, in his own Name, and not in the Name of the Lord. In arguing this Case, Holt Ch. Just. said, That a Copyholder hath Right of Common, either as belonging to his Estate, or to his Land; that where it belongs to his Estate, and as such he claims Common in the Lord's Wasse there, if the Copyhold is enfranchised, the Common is lost and extinguished, for that continues when the Estate is gone; the other Common is as belonging to his Land, (viz.) where a Copyholder hath Common in the Wastes of another Manor, in that Case the Common is not lost by an Infranchisement of the Copyhold, because tho' the Estate is gone, the Land still continues. It was argued for the Plaintiff in the Original Action, That this Title set forth in his Declaration (admitting it to be

Mod. Cases 19.
1 Lutw. 126.
1 Salk. 364, 170.
Where a Copyhold is pleaded, the Omission of the Words tent' ad voluntatem Domini makes it ill.

bad)

bad) ought to be recited as Unnecessary and Surplusage, and the rather, because there was no Occasion for him to set forth any Title; he had the Possession, and that is sufficient against the Defendant, who was a Stranger and Wrong-doer, which is very true; but if he will set forth a Title, as he had done in this Case, and that Title is inconsistent in itself, a Verdict will not help it; now here he could have no Title as a Copyholder, because it doth not appear, that he held ad voluntatem Domini, and he could have none as a Freeholder, because he had prescribed in the Manor, so that his Title being absurd and inconsistent, the Declaration must be ill; and for that Reason the Judgment in C. B. was now affirmed in B. R. for the Defendant in Error.

Smith versus Ary. Hill. 2 Annæ B. R.

Postea Gaming. (1.)
Mod. Cases,
128.
Indebitatus Assumpsit
will not lie
for Money
won at play.

THE Plaintiff declared, That in Consideration he had agreed and promised the Defendant to play at such a Game, and to pay what he lost, the Defendant promised to play, &c. and to pay, &c. and sets forth, that they played, &c. and that the Defendant lost so much, which he had not paid; Cumque etiam, he (the Plaintiff) had won so much Money ad ludum pred', the Defendant in Consideration inde, promised to pay, &c. Upon a Demurrer to this Declaration it was insisted for the Plaintiff, that the mutual Promises in the first Count must be understood as if repeated in the second, (viz.) That the Playing was upon the same Agreement, being alledged to be won, ad ludum pred'. Sed per Curiam, The second Count is not the better for the first, for they are separate and distinct, so that the Agreement laid in the first, will not go to the second; and that an Indebitatus Assumpsit will not lie for Money won at Play, so there was nothing but * mutual Promises, and Debt will not lie upon a Promise, nor by Consequence an Indebitatus, but there must be a Consideration, or a Quid pro quo, &c.

* Hob. 18,
88.
1 Vent. 51,
44, 96, 153.
Hard. 486.
3 Lev. 118.

Roe versus Haugh. Pasch. 9 Will. III. in Camera Scaccarii.

What shall
be mutual
Promises af-
ter a Verdict.

THE Case was, B. was indebted to A. in 42 l. and C. in Consideration that A. would accept him to be his Debtor for the 42 l. due to the said A. by and from B. super se Assumpsit & eidem A. fideliter promisit quod ipse eandem 42 l. would pay to him. And an Assumpsit was brought against C. averring him fore debitorem ipsius A. without saying, that B. was discharged; and upon Non Assumpsit there was a Verdict for the Plaintiff

in B. R. and which was afterwards affirmed in the Exchequer Chamber, for being after a Verdict, they held they ought to do what they could to help it; and therefore not taking it as a Promise only on the Part of C. because as such, it could not bind him, unless B. was discharged, they construed it to be a mutual Promise, viz. That C. promised A. to pay the Debt, and in Consideration thereof, A. promised to discharge B.

Butcher *versus* Andrews. 2 Salk. 731. The Pleadings.

IN Assumpsit the Case was, the Father was bound by his Promise to pay the Plaintiff so much Money as he should lend the Son, and for such Goods as he (the Plaintiff) should let the Son have, so as the Money lent, and the Goods sold and delivered to him (the Son) did not exceed 5 l. The Action was brought for 5 l. Money lent, and likewise for 5 l. being the Value of the Goods sold and delivered, and likewise for so much Money mutuo dat' & accomodat' to the Son at the Father's Request. Upon Non Assumpsit pleaded, the Plaintiff had a Verdict, and 3 l. Damages: But upon a Motion in Arrest of Judgment, this Verdict was set aside; for 'tis plain, the Defendant would not be indebted for more than 5 l. because he engaged for no more, and if the Jury had given more it had been naught; 'tis true, they gave but 3 l. Damages, but yet that will not help the Declaration, which was for 5 l. Money lent, and for 5 l. the Value of the Goods delivered, and it doth not appear to the Court, but that the Defendant hath paid 5 l. already, and this now claimed is over and above.

1 Salk. 23.
Where an Action is brought for more than the Defendant promised to pay, 'tis not good.

Bourkmire *versus* Darnell. Mich. 3 Annæ.

ASSUMPSIT, &c. In which the Plaintiff declared, That the Defendant in Consideration he (the Plaintiff) at the Instance and Request of the Defendant, would lend and deliver to one Joseph English unum Spadonem of him the said Plaintiff, to ride to Reading in Berkshire; he (the Defendant) Assumpsit, and promised to the Plaintiff, that the said Joseph should redeliver the said Gelding safely to him the Plaintiff. Upon Non Assumpsit pleaded, the Evidence at the Trial was, That the said Joseph English would have hired the Gelding of the Plaintiff, but could not prevail with him till the Defendant came, and did undertake for the Redelivery; upon which the Counsel for the Defendant insisted, that the Plaintiff ought to produce a Note in Writing of this Agreement, which being over ruled, there was a Verdict for the Plaintiff;

1 Salk 27.
Mod. C. 248:
Where there is a collateral Undertaking for the Act of another, it must be in Writing.
See *antea* Smith *vers.* Westhall.

* 29 Car. 2.
cap. 3.

tiff; and it was moved in Arrest of Judgment, and per Curiam adjudged, That it was void by the * Statute of Frauds, because it was a collateral Undertaking for the Act of another, and in such Case the Statute requires, that it must be in Writing. The Difference is, where the whole Credit is given to the Undertaker, in such Case the third Person is in Nature of a Servant, and there is no Remedy against him; 'tis true, the Undertaking is good, but 'tis not within the Statute, and therefore not requisite it should be in Writing; but where the Undertaker comes in Aid only to procure or obtain Credit for another, so that the Remedy may be against both, this is a collateral Undertaking for another, and made void by the Statute, if 'tis not in Writing. Et per Curiam, In the Principal Case the Plaintiff may maintain an Action of Detinue against Joseph English, upon the Original Delivery of the Gelding; and therefore this Promise, made by the Defendant, was to answer for the Act and Default of another, for which Reason the Verdict was set aside.

Hutton *versus* Mansell. Pasch. 3 Annæ.

What shall
be a suffici-
ent Evi-
dence of a
Promise by
Feme-sole to
marry.

CASE, &c. by a Feme Sole, in which she declared quod cum she had agreed and promised to marry the Defendant, he in Consideration thereof promised to marry her. Upon Non Assumpsit pleaded, the Cause was tried before Holt, Ch. Just. and the Promise of the Man was proved, but no actual Promise on the Woman's Side, yet he held there was sufficient Evidence to prove that the Woman likewise promised, because she carried her self as one consenting and approving the Promise of the Man.

Savile *versus* Roberts. 10 Will. III. at Guildhall,
coram Holt Ch. Just.

5 Mod. 394.
410.
1 Salk. 13.
Case for cau-
sing the
Plaintiff to
be malicious-
ly indicted,
&c. he must
prove the
Malice and
Damages.

CASE for causing and maliciously procuring the Plaintiff to be indicted for a Riot. It was held by Holt, Ch. Just. 'Tis not sufficient, that the Plaintiff prove he was innocent, but he must prove express Malice in the Defendant; he likewise held, that this Action is not grounded upon the Conspiracy, but upon the Damage, and therefore the Plaintiff must prove his Damages, otherwise the Action will not lie: But in a Writ of Conspiracy 'tis otherwise, and where such a Writ is brought, if one is acquitted the other cannot be found guilty.

Sheer *versus* Brown. Trin. 2 Annæ B. R.

INdebitatus Assumpsit, in which the Plaintiff declared, that the Defendant being indebted to him for Goods sold in so much Money, in Consideration thereof super se Assumpsit, there was Judgment by Default, and upon a Writ of Error brought it was objected, that the Declaration is ill, because it did not set forth, that the Defendant * promised, and it might be a Stranger promised, or that the Plaintiff himself promised, and there is no other Person in this Record to promise, but only the Defendant; 'tis true, if there had been Two or more Defendants, it might have been otherwise, because in such Case it would have been uncertain, which of them had made the Promise; and per Gould Just. the Difference is also between a collateral Promise and a Promise by Operation of Law: for in the latter Case 'tis well, but not in the first. See 3 Cro. 913. Noy 50.

Indebitatus Assumpsit, and did not say, that the Defendant promised, held good. * 1 Lev. 164. Raym. 123. Sid. 246.

College of Physicians *versus* Rose. Hill. 1703. B. R.

IN a Special Verdict, in an Action on the Case, the Jury found, that Rose the Defendant was an Apothecary, and sent for by a sick Person (of what Distemper non constat) that he came to the Patient, and being required to send him something in order to his Cure, he accordingly sent him some Bolus's, and this being without any Licence, the Question was, whether it was practising as a Physician; and per Curiam, it is, for the making up and compounding Medicines is the Business of an Apothecary, but the Judging what is proper for the Cure, and Advising what to take for that Purpose, is the Business of a Physician; therefore let the Distemper be what it will, the Prescribing and Advising what is fit for it, is the Business of a Physician, tho' without a Fee, but that rarely happens; so the Plaintiff had Judgment, but it was reversed in the House of Peers.

Mod. Cases 44. The prescribing what is fit for a Patient is practising Physick.

Ashby *versus* White. Mich. 2 Annæ.

CASE against the Constables of Ailesbury in Bucks, for obstructing the Plaintiff to Vote, and for refusing to receive his Note at the Election of Burgesses for that Borough, to serve in Parliament; upon Not guilty pleaded, the Plaintiff had a Verdict, and upon a Motion in Arrest of Judgment, three Judges

1 Salk. 19. Case will not lie for hindring the Plaintiff to vote at the Election for a Burgess to Parliament.

held, that this Action would not lie till the Parliament had decided, whether the Plaintiff had a Right to Vote as an Elector.

But Holt Ch. Just. was of a contrary Opinion, ff. That the Plaintiff had a Right to Vote, and that in Consequence thereof the Law gives him a Remedy, if he is obstructed, and that this Action is the proper Remedy.

By the Common Law of England, every Commoner hath a Right not to be subjected to Laws made without their Consent, and because such Consent cannot be given by every individual Man in Person, by Reason of Number and Confusion, therefore that Power is lodged in their Representatives, elected and chosen by them for that Purpose, who are either Knights, Citizens, or Burgeses.

That the Election of Knights of Shires is by Freeholders, and this is a Right which they have in respect of their Freeholds, arising from and inseparately incident to such Freeholds; for before the Statute of H. 7. every Freeholder, tho' of never so small a Value, had a Right to Vote at such Elections; and tho' this was confined by that Statute to Freeholds of a certain Value, yet 'tis still a Right, as it was at Common Law, and annexed to the Estate, and therefore 'tis a real Right or Franchise.

As to Boroughs, some are not incorporate, but are so by Prescription, and their Representatives are chosen by Burgeses, who vote *ratione Burgagii* & *ratione tenuræ*, and this like the Case of a Freeholder before-mentioned is a real Right annexed to the Tenure in Burgage.

In other Boroughs which are incorporate and subsist by Charter, the Right of Election is a personal Right granted to the Corporation, for the Use and Benefit of the Members thereof; for tho' in Point of Prender it vests in the Corporation only as an Inheritance; yet quoad the Exercise and Enjoyment, 'tis distributively the personal Right of every individual Member of the corporate Body, for they are Persons who are represented, and therefore they are to pay the Wages to the Person whom they choose; and if they refuse, 'tis to be levied upon the respective Members of the Corporation.

* 12 Rep.
120.

And as this is a personal Right, so it cannot be given but to a corporate Body; and tho' my * Lord Hobart would have it good in a Place incorporate, and this by Way of Ordinance, yet that is not Law, and all the other Judges were against him.

The Right of Citizens to vote for their Representatives is of the same Nature, and built upon the same Foundation, and no wise different but in Point of Eminence, as Cities are more worthy and eminent than Boroughs.

This is a noble Franchise and Right, and therefore not without a Remedy where 'tis opposed, for Want of Remedy and Want of Right are Convertibles.

Harecourt *versus* Hastings. Pasch. 4 Will. III.

IN an Action on the Case for Fees and Wages, the Defendant pleaded in Abatement, Et petit judicium de Billa, & quod Billa prædicta cassetur, for Incertainties in the Declaration, and insisted upon many Errors therein: Sed per Curiam, it shall not be allowed for the Defendant to take Advantage of any Errors in the Declaration upon a Plea in Abatement, but he ought to demur, for he was ruled to answer over.

No Advantage shall be taken to a Declaration upon a Plea in Abatement, the Defendant ought to demur.

Case, &c. against a Taylor, in which the Plaintiff declared, that he (the Plaintiff) employed him to make a Coat, and that he made it tam inepte & inartificiater, that it was of no Use to him; upon a Demurrer to this Declaration it was held naught, because non constat, wherein it was spoiled.

1 Vent. 260, 269.

Case, in which the Plaintiff declared, that he being seised of such a Close, had a Way, &c. and that the Defendant stopped it, adjudged good, because Possession is a good Title against a Wrong-doer.

Case against a Carrier, and declares for four silver Cups & uno poculo argenteo, and not uno alio poculo, &c. adjudged good; for if it be aliud, the Damages shall be intended to be given for it; if it be idem & non aliud, then 'tis only Tautology, and in that Case the Damages may be rightly given.

2 Vent. 78.

Brooks *versus* Hayne.

THE Plaintiff, who was an Attorney, was employed by T. S. who made the Defendant his Executor, and died, and afterwards the Plaintiff brought an Assumpsit against this Executor for several Fees, and for so much Money laid out in prosecuting and defending several Suits at Law for the Testator; and sets forth, that he had demanded the Money of the Testator in his Life-time, and of the Executor since his Death, and that neither the one nor the other had paid it, &c. The Defendant pleaded the Statute * 3 Jac. and that the Plaintiff had not given the Testator, or to this Defendant, any Bill of Charges, according to that Statute, before the Action brought; and upon a Demurrer to this Plea, per Curiam, it was adjudged a good Plea.

Raym. 245. The Defendant pleaded the Statute 3 Jac. against an Action brought by an Attorney, that he had not given a Bill of Charges, and good.

* Cap. 7.

A D D I T I O N.

¹ Bulst. 296.
² Cro. 183.
 Noy 32.
² Leon. 183.

AN Addition after the alias dictus is ill; as for Instance, where the Indictment was against W. R. alias dictus W. R. de H. for this is no Addition.

For where the Præcipe was Richardo Joyner, civi & pannario London, alias dictus Richardus Joyner de London Armiger, adjudged, that without the alias dictus, there was no Addition of the Will; and that if the Party is not sufficiently named in the first Part of the Writ, the Alias cannot Aid or help it, because 'tis only to make the Writ agree with the Deed, but is not material, for 'tis neither answerable, traversable, or issuable.

Et per Holt Ch. Just. If W. R. of Wilts, commit Felony at Westminster, he is always indicted by the Name of W. R. de Westmonast. and the Practice being always so, this may properly be said to be his Addition.

Debt against W. R. de H. Peoman, alias dictus W. R. de H. Son and Heir of R. R. and so charges him as Heir; this was adjudged ill, because the Writ doth not name him Heir in the Premises, but in the Alias dictus.

Cro. Eliz.
 334

Trespas against W. R. de H. Chandler, the Defendant pleaded in Abatement, that he was a Gentleman; and upon a Demurrer to this Plea it was adjudged ill, because he did not deny that he was a Chandler; and if a Gentleman exercise a Trade, he may be called by the Name of his Trade, tho' he is a Gentleman.

The Earl of Banbury versus Wood.

¹ Salk. 5.
 Addition not
 necessary in
 a *Homine Re-*
plegiando.

IN a *Homine replegiando*, the Defendant pleaded in Abatement, there was no Addition of Will or Place of Abode in the Writ, &c. and upon a Demurrer to this Plea, he was ruled to answer over; for, per Curiam, an Addition is not necessary, because the Pluries Replevin, upon which the Court holds Plea, is not the original Writ, but the original Writ is Vicontiel, and no Process of Outlawry lies upon it, and therefore 'tis not within the Statute; also since there is no Addition in the first Writ, there must be none in the Pluries, for that must not vary but pursue the first Writ on which it was founded; and tho' the Statute of H. 5. says, there shall be an Addition in all original Writs where Eri-gent lies, yet that must be intended where Proceedings are upon the first Writ.

ADMINISTRATION.

ADjudged, that Administration of the Goods of a Feme Co-vert ought to be granted to the Husband, for he is the next and nearest Friend; the Care of the Funeral belongs to him, and he might have recovered or released whatever belonged to her. To whom grantable.

But if the Wife was an Executrix to another, then, as to the Goods which she had in that Capacity, Administration must be granted to the next of Kin to the Testator. 4 Rep. 51. Jones 175.

Where there is a Brother and Sister of the Half-Blood, Administration may be granted to the Sister; because she is in equal Degree of Kindred; but if the Sister is married, then it must be granted to the Brother, and not to her and her Husband, because in effect it makes the Husband Administrator, who is not of Kin to the Intestate, and if she die the Husband would still continue Administrator, and so might possess himself of the whole personal Estate, which is contrary to the * Statute. Allen 36. Stiles 45, 74.

Where an Executor refuses or dies before Probate, Administration shall be granted to the next of Kin of the Intestate cum Testamento annex, unless there is a Residuary Legatee, and then it must be granted to him. * 21 H. 8.

The Husband made his Wife Executrix, and gave her the Residue of his moveable Goods and Chattels; now if the Wife die before Probate, Administration must be granted to the next of Kin to the Husband, because the whole Residuum was not given to the Wife; but if the Whole had been given to her (viz.) All his Debts, Goods and Chattels whatsoever, then Administration might be granted to the next of Kin of the Wife, because she was made a Residuary Legatee of the whole. Jones 125.

At Common Law the Ordinary might Repeal an Administration at Pleasure; but now since the Statute 21 H. 8. when once 'tis duly granted according to that Statute, it cannot be repealed, for his Power is then executed; but if 'tis not duly granted according to the Statute, as for Instance, if granted to a wrong Person, in such Case he may repeal it and grant it to another, for he hath not executed his Power. Sed nota, If the Administration is repealed for Want of Form in the Grant, in such Case the Ordinary must regrant it to the same Person, tho' there are others in equal Degree. Repeal. Sid. 372, 179. Jones 262. Raym. 43. 1 Mod. 230.

Where

3 Cro. 460.
Raym. 224.
Vent. 303.

Where an Administration is repealed, because it should be granted to another, in such Case all Acts of the first Administrator stand good; but if it is repealed because there is a lawful Executor, then all his Acts are void.

Where a Will is of Lands and Goods, the Court may repeal upon an Appeal; but where 'tis of Lands only they cannot, because there they had no Authority to prove, and by Consequence had no Authority to repeal.

Sir Geo. Sands's Case.

Raym. 93.
Sid. 179,
403.
Where the
Ordinary
hath a Pow-
er and exe-
cutes it, it
shall not be
repealed.

SIR Geo. Sands administered to his Son, and afterwards a Woman pretending to be his Wife, sued for a Repeal, but a Prohibition was granted, because the Ordinary had an Election to grant it either to the Father or Wife, and had executed his Power by granting it to the Father, per Holt Ch. Just.

But where a Feme Covert died intestate, and the next of Kin to her obtained Administration, and the Husband sued for a Repeal, a Prohibition was denied per Holt Ch. Just. because in this Case the Ordinary had no Power or Election to grant it to any Person but to the Husband; and this is not within the Statute of H. 8. but within the Statute of Ed. 3.

Of pleading
Plene admin-
istravit.

Upon this Issue the Defendant cannot give in Evidence a Judgment not satisfied, because 'tis an Administration of another Nature than he had pleaded.

Payment of Debts pendente Brevi is no Evidence upon this Issue, for the Plea is Plene administravit in the præter-Tense, and this Evidence proves an Administration only since the Purchase of the Writ, and therefore the Defendant must plead it Specially.

Allen 47.
3 Cro. 570.
contra.

In a Scire facias, upon a Judgment against the Testator, if the Defendant plead Plene administravit, 'tis ill upon a special Demurrer, because by the Plea the Defendant admits that Goods came to his Hands, and therefore he ought to shew how he administered, that it may appear it was not in paying of Debts of an inferior Nature, and this is in Favour of Judgments; but upon a general Demurrer such a Plea may be good, because the Defendant might have paid other Judgments, and so shall his Plea (which is confessed by the Demurrer) be intended.

Moor 858.

Nota, The proper Plea in this Case is Riens inter maines at the Time of the Testator's Death.

Slater *versus* May. Mich. 3 Annæ B. R.

ADministratoꝝ, durante absentia W. R. Executoꝝ, brought an Action of Debt upon a Bond, but did not aver where W. R. was absent, or that he was absent; per Curiam, 'tis reasonable the Ordinary should have Power to grant Administration in this Case, and such Administrator is accountable to the Executor, and we will intend him beyond Sea, but Absence should have been averred in this Case.

Action by an Administrator, during the Absence of the Executor, he must aver, the Executor is absent.

ADMIRALTY.

Anonimus. Hill. 13 Will. III.

UPON a Prohibition to a Suit in the Admiralty for Mariners Wages, it was held per Holt, Ch. Just. That if a Ship is * lost before she arrives to any Port of Delivery, the Seamen loose all their Wages, but if she is lost after she comes to a Port of Delivery, then they only loose their Wages from the last Port of Delivery; but if they run away, tho' after they come to a Port of Delivery, they loose all their Wages.

Seamen loose their Wages where the Ship is lost before she comes to a Port.
* Sid. 129.

King *versus* Perry. Pasch. 1 Will. III.

PER Holt, Ch. Just. an Obligation taken in the Admiralty to appear and sue there, is sueable in that Court, for 'tis a Stipulation in Nature of Bail at Common Law: But where there were 13 Part Owners of a Ship, and one of them refused to let her go to Sea, whereupon a Stipulation was taken for the Share of the Party refusing, and afterwards the Ship went her Voyage, and this Stipulation being put in Suit in the Court, a Prohibition was granted, because the Building the Ship and the Charter Party were at Land.

Where an Obligation is sueable in the Admiralty, and where not.

Hob. 12.
Moor 918.
Where a
Master may
pawn a Ship,
and were
not.

Adjudged, that where a Master pawns the Ship at Sea, the Admiralty hath a Jurisdiction; and nota, he may pawn to relieve the Ship in Extremity, for he being constituted Master of the Ship, hath implicitly a Power to preserve it in Cases of Danger, but he cannot pawn it for his own Debt, because he has neither a Property or Power for that Purpose; and if the Admiralty should confirm an Hypothecation of that Nature, a Prohibition shall be granted.

Hob. 212.

If a Man give Bond at Sea for a Debt contracted at Land, the Admiralty have no Jurisdiction, for one Thing must not only be done at Sea, but the whole must concur to give them Jurisdiction; so if a Debt is contracted at Sea, and a Bond given for that Debt at Land, so if there be a Contract at Land and a Breach at Sea, in these and the like Cases the Common Law shall be preferred.

ADVOWSON.

The King versus Bishop of Chester, & al'.

2 Salk. 560.
5 Mod. 297.
Where an
Advowson is
in Gros, and
where 'tis
appendant
again.

IN a Quare Impedit, &c. it was held by Holt, Ch. Just. to which the Court agreed, that where an Advowson is appendant to a Manor, and the Owner mortgages the Manor in Fee, excepting the Advowson, that by this Means 'tis become in Gros; but if the Money be paid punctually at the Day, then 'tis become appendant again, and if 'tis paid after the Day, 'tis appendant in Reputation, and may pass by the Name of an Advowson appendant in a Grant or other Conveyance, tho' in Reality the Appendancy is destroyed; for if 'tis severed one Instant from the Manor, by the Act of the Party, 'tis then in Gros, and not appendant.

So where the Owner of a Manor, to which an Advowson was appendant, accepts a Fine of the Advowson, with a Grant and Render back of every second Turn, now for such Turn the Advowson is in Gros, but for other Turns the Appendancy still continues; But if a Man levy a Fine of the Advowson, and accepts a Grant and Render of every other Turn, the Appendancy is quite

gone, because there was an Instant of Time in which it became severed.

So where there are two Coparceners of a Manor, to which an Advowson is appendant, and they make Partition of the Manor, without taking Notice of the Advowson, at every other Turn 'tis still Appendant; but if there had been any express Exception of the Advowson, it would then be in Gross.

Reynolds *versus* Blake. Pasch. 9 Will. III. in C. B.

IN a Quare Impedit, it was the Opinion of the Court, That where there are two Coparceners of a Manor, to which an Advowson is appendant, and the whole Demesnes are allotted to one, and the Services to another, by this Means the Manor is destroyed, and the Advowson becomes in Gross; but if one of them die without Issue, so that the Demesnes descend to him who hath the Services, the Manor is now revived, and the Advowson is appendant again, because this was a Severance by Act of Law. See 17 Ed. 3. 38. 12 H. 7. 5. 8 Rep. 79. 1 Inst. 122. Bro. Quare Imp. 118.

Postea Tit. Appertaining, S. C. Where an Advowson appendant to a Manor is become in Gross.

ALEHOUSES.

Anonymus.

THE Defendant was indicted for keeping a Tippling House, without License, contra formam Statut': Upon Not guilty pleaded, he was found guilty; and it was insisted in Arrest of Judgment, that at Common Law any Person might keep an Alehouse in a fit and convenient Place for that Purpose, that this was a statutable Offence, and the Penalty by the Statute is, that the Offender shall be committed by two Justices, and a Recognizance taken of him, with two Sureties, not to sell Ale, &c. and that this being the Punishment by the Statute, for that Reason * an Indictment will not lie; and the

E

Court

An Indictment will not lie where a Statute creates an Offence, and appoints the Punishment.

Postea the King v. Edwards that it will not lie.

* Palm. 388. 2 Roll. Rep. 398.

2 Cro. 643

* 1 Mod 34. Court being of this Opinion, Judgment was staid, tho' an express * Case was cited to the contrary.

Stephen Watson's Case. Mich. 13 Will. III.

† 1 Salk. 45. THE same Point came in Question again in Stephen Watson's Case, which is imperfectly reported in † 1 Salk. by the Name of Stephens versus Watkins. The Case was thus :

Stephen Watkins was indicted at the Quarter-Sessions, for that he, on the first Day of October, Anno 10 Will. 3. and at divers other Days and Times at B. & c. without any Licence from two Justices of the Peace, did keep an Alehouse, and sold Ale and Beer there contra pacem & contra formam Statut' ; upon a Demurrer to this Indictment it was insisted,

1. That an Indictment would not lie in this Case.
2. That admitting it would lie, yet not at the Sessions.
3. But admitting that it would lie, and at the Sessions, yet this Indictment is ill in Form.

* Cap. 25.

† Cap. 3.

** 2 Cro. 643.

Castle's Case.

1 Roil. Rep.

390.

First, This Indictment must be either upon the Statute * 5 & 6 Ed. 6. or upon the Statute † 3 Car. 1. and both these Statutes prescribe another Method of punishing this Offence, which was made so by one or both of them, and that ** Method and no other must be followed, and if so, then an Indictment will not lie.

(2. Point.) But admitting it will lie, yet not at the Sessions ; for this is not an Indictment upon the Statute 4 Jac. 1. cap. 4. for selling Ale by the Barrel without Licence, for in that Case, by the very Words of the Statute, an Indictment will lie at the Sessions ; but this is an Indictment upon one of the Statutes before mentioned, and neither of them give the Sessions any Power in this Case, and they have no Power, but what is expressly given them by Statute.

(3. Point.) But this Indictment is naught in Form, for the Caption is, that it was presented by the Oath of twelve Men sworn and charged, without saying, †† adtunc & ibidem jurat' & onerat', and thereupon it was adjourned ; but afterwards, in Mich. 13 Will. 3. it was adjudged, that this Indictment would not lie, because it was a new Offence created by Statute, and a particular Method of punishing the Offender was appointed by the Statute, which should be followed, and no other.

†† 1 Vent.
60.

The King versus Randall.

There is a short Note of this Case in 2 Salk. but the Case was as followeth, (viz.) two Orders were removed by Certiorari into B. R. which Orders were made at the Sessions in Middlesex, the first whereof recites, that whereas R. Randall had lately taken an House at Hogsdon, designing to sell Ale and Beer there; and whereas the House had never been inhabited by other Persons than Merchants and Persons of Quality, and there were Alehouses enough in Hogsdon already, therefore 'tis ordered, that no Licence be granted to any House there, wherein Ale was not formerly sold; and that no Licence should be given to Randall; the other recites, that whereas a Licence was surreptitiously obtained by Randall from Two Justices, to sell Ale there, &c. that yet he should be suppressed, &c. from drawing Ale there, &c. and now it was moved to quash these Orders, because by the Statute 5 & 6 Ed. 6. the Quarter-Sessions cannot controul the Authority of two Justices in this Matter: Et per Holt Ch. Just. This Difference hath been taken, (viz.) where an Authority is given to two Justices to do a Thing, and from which there lies no Appeal, there it may be commenced and done in the Sessions; but if an Appeal is given, then the Sessions hath not an original Jurisdiction, it must not be begun there; as for Instance per 18 Eliz. and 43 Eliz. till the Statute 3 Car. 1. But here the Question is, whether the Sessions can suppress an Ale-house licensed by two Justices of Peace, and adjudged they could not, except 'tis for Disorders committed, and thereupon these Orders were quashed.

2 Salk. 470.
Sessions
can't suppress an Ale-house licensed by two Justices, unless 'tis for Disorder.

5 & 6 Ed. 6.
cap. 25.

The King versus Edwards.

THE Question * whether an Indictment would lie for selling Ale without a Licence, was again stirred, notwithstanding the Resolution in Stephen Watkins's Case before-mentioned; and two Judges were of Opinion that it would not lie; but per Holt Ch. Just. an Indictment is more beneficial for the Subject, because 'tis a summary Way of Proceeding, and therefore it seems reasonable that it should lie in this Case, notwithstanding 'tis an Offence created by the Statute, and a particular Punishment thereby directed; and so it hath been adjudged in a parallel Case; as for * Instance, 'tis prohibited by the Statute 22 Car. 2. to travel with a Waggon drawn with more than five Horses at length; this is a new Law, and 'tis a new Offence to transgress it; but yet an Indictment will lie against the Offender,

* Mod. Cases 86.

Ante Stephen Watson's Case.

* 4 Mod. 144.

tho' a particular Punishment is directed by that very Statute which created the Offence.

ALIEN. See Descent *per totum*.
See Trial 2.

Progers *versus* Arthur. Pasch. 5 Will. III. B. R.
Rot. 531.

When a Traverse makes Issue too streight.

Jones 261.

INdebitatus Assumpsit, the Defendant pleaded, that the Plaintiff was an Alien Enemy, born at Roan in France, under the Allegiance of, &c. The Plaintiff replied, that he was born at Hamburg, under the Allegiance of the Emperor, a Friend of the King, &c. and traversed, that he was born at Roan in France, &c. to which Replication the Defendant demurred, and had Judgment, because by the Traverse Roan is Parcel of the Issue, which is very immaterial, it being too streight; and instead thereof the Plaintiff should have traversed, that he was born under the Allegiance of the French King: Nota tamen, in a Case between Grodeck and Briggs, which was Debt for an Escape, the Defendant pleaded, that the Plaintiff was an Alien Enemy, born at Roan in France, under the Allegiance of the French King, &c. and the Plaintiff replied, that he was a natural Subject; born at Westminster in the County of Middlesex; and traversed that he was born in France; and upon Demurrer the Court held this to be an immaterial Traverse, for the Plaintiff should have rested, and tendered an Issue upon his being born at Westminster.

1 Vent. 417.

The Capacity of an Alien may be considered, either in Reference to Inheritances and to Freeholds; or to Goods and Chattels, as to Inheritances, &c. an Alien may purchase by his own Account or Contract, tho' he cannot retain against the King, but he cannot take a Freehold by Action in Law; therefore he cannot be a Tenant by the Courtesy; nor an Alien Woman be Tenant in Dower; for the Law doth nothing in vain, therefore it will
not

not give him or her a Freehold in the Causes before-mentioned, because they cannot keep it.

Chattels are either real or personal, now an Alien is not capable of a Chattel real; as for Instance of a Lease of Lands, but an Alien Merchant may take a Lease of an House to dwell in, as incident to Trade and Commerce, but he is not capable of Chattels personal.

At Common Law, a Lease made to an Alien Artificer, either of an House or Shop, was good between the Parties, but forfeitable to the King; but now, if a * Shop is let to an Alien Artificer, the Lease is void by the Statute 32 H. 8. and if the Lessee brings an Action of Debt for Rent, the Lessee may plead this Statute in Bar to the Action; but if an House or Shop is let to an Alien Gentleman, the Lease is not void within that Statute, neither is it pleadable in Bar to an Action.

Hob. 143.
1 And. 20.
Goldf. 29.
1 Leon. 47.
4 Leon. 82.
Sid. 417.

* 1 Sand. 7.
Sid. 308.

A M E N D M E N T. *See* Variance.

A Mendments are usually made in Affirmance of Judgments, and seldom or never to reverse or destroy them:

By the Statute of * Marlbridge, 'tis enacted, that De cætero * fines non capiuntur pro pulchre placitando, (i. e.) for Leave to amend vitious and bad Pleading, &c. from which it may be observed, that there were Amendments at Common Law, but then the Party was to pay a Fine for Leave to amend, like a Fine pro licentia concordandi; for he was to be amerced for ill Pleading, which Amercement was due to the King; and that being now taken away by this Statute, it seems reasonable that the Party should pay Costs upon an Amendment.

There are but two Statutes of Amendments (viz.) 14 Ed. 3. and 8 H. 6. the one extends to Process out of the Roll, (i. e.) to Writs which issue out of the Record, and not to Proceedings on the Roll it self; and this last Statute hath always been construed in Imitation of the first, the Intent of it being to amend in Matters precedent to the Judgment, and to support the Judgment it self, and to avoid Writs of Error.

The Statute 16 & 17 Car. 2. is in the Nature of a Statute of Jeofailes; it extends only to superiour Courts, and to the Courts

* cap. 11.

Courts of Counties Palatine, and that only after Verdict, unless in some particular Cases; by this Statute all Defects are amendable after Verdict, which do not alter the Verits of the Cause, nor the Nature of the Trial and Issue.

Therefore where the Matter of the Suit is not actionable, the Judgment shall be arrested; so likewise where there is a Cause of Suit, but the Plaintiff hath took a wrong Remedy; as for Instance, if he bring an Action on the Case for Words, which are not actionable; if he bring an Action of Debt upon a Bond before it is due, or Debt for Rent before 'tis in Arrear; so if he bring Covenant, and doth not assign a sufficient Breach, or Assumpsit, and doth not shew a sufficient Consideration, these are not helped by the Verdict.

At Common Law original Writs were not amendable, because coming out of another Court, they are not subject to be corrected by B. R. but in the Case of the King, they might be amended in Chancery.

But now by the Statute 8 H. 6. the Court may amend any Fault in an original or judicial Writ, if 'tis the Dispersion of the Clerk.

8 Rep. 156.
Blackmore's
Case.

Hob. 129.

Thus if the Cursitor hath Instructions to make out a Writ against W. R. generosum, and instead of that he Names him Militem, this Mistake is amendable, for it must be imputed to his Negligence or Oversight: But if he is named Generosus in the Original, when it should be Miles, and the Cursitor had no such Direction, this cannot be amended, because 'tis not his Fault, but the Neglect of true Information by the Party himself.

8 Rep. 159.

If an Original is *Præcipe quod solvit*, instead of *Præcipe quod reddat*, or *Hos breve* for *Hoc breve*, 'tis not amendable by the Statute 8 H. 6. because this must be imputed to the Ignorance of the Cursitor; it makes the Writ without due Form which is required by Law, for *forma dat esse rei*, and prevents Confusion.

2 Saund. 39.
2 Vent. 171.
* 2 Vent. 173.
4 Rep. 44.

But by the later Authorities, false Latin is amendable, as in *Waste*, if the Writ is * *destructio* instead of *destruatio*, so *Hos breve* for *Hoc breve*, or *Debet* for *Debeant*.

Sid. 379, 421.

So Debt in the *Debet* when it should be in the *Detinet*, per Stat. 16 Car. 2. amendable, and Want of Pledges in a Suit by Original, because 'tis only Matter of Form, by which neither the Right of the Cause or the Nature of the Trial is altered; the like where the Suit is by Bill.

* 2 Saund.
308, 402.

The Omission of *Vi & Armis & contra pacem* was formally held fatal, even after a Verdict, for it was held to be Matter of Substance, because it brings a fine to the King, but now 'tis amendable by the last Statute; so is the Omission of a * *proferat hic in Curia* after a Verdict, but not upon a Demurrer.

Sid. 70, 143.

And by the same Statute an Omission of a *Capiatur*, or *Miseriordia* shall be amended, and so 'tis if a *Capiatur* be entered in-

stead

stead of a Misericordia ; so where an Action is brought by Thomas, and the Judgment was Quod Johannes recuperet, this is amendable, for the Mistake is only of the Name, which before was right in the Record ; and by the Statute, no fault shall impair the Judgment which doth not affect the Merits of the Cause, or the Right of the Party.

Greenwood *versus* Piggott. Trin. 7. Will. III.
B. R.

T Respals for an Assault and Battery ; the Defendant pleaded Son assault demesne, the Plaintiff replies, De son tort demesne absque tali causa & de hoc ponit se super patriam & predict' * Edwardus (which was the Plaintiff's Name) similiter, when it should have been the Defendant's Name ; the Original, the Issue and the Nisi prius Roll, had both this Mistake, but the Plea Roll was right. Adjudged, that it should be amended.

Where the Nisi prius Roll shall be amended by the Plea Roll.

* 3 Cro. 435.
8 Rep. 161.
2 Cro. 444,
587, 157, 627.

Sanders *versus* Lenoir. Mich. 1. Annæ B. R.

In a Writ of Error, upon a Judgment in the Court at Northampton, the Record removed being Præceptum fuit, instead of præceptum est, in the Venire, and Messes instead of Missis ; the Draught below was right, it being drawn by the Clerk and perused by Counsel ; and now upon a Motion to amend the Record by the Draught (which the Clerk swore to be Right below) it was denied, because it was no more than a private Paper in their own Custody, of which this Court could not take any Notice ; and if this was done by Contrivance (as alledged) the Defendant might bring his Action.

A Record shall not be amended by the Draught below.

Anonymus. Pasch. 7 Will. III.

Ruled, That whilst the Declaration is in Paper, the Court may give leave to amend any Thing in it at Pleasure, because in such Case 'tis not within the Statutes of Amendments ; but when once it comes in Parchment the Court can give Leave to amend no farther than is allowed by the Statute, for 'tis then a Record, and ought not to be dash'd or obliterated.

Whilst all is in Paper 'tis not within the Statutes of Amendments.

Nota, After a Demurrer only given, but not joined, the Party cannot amend without Leave of the Court.

Where

Where the Roll varies from the Original, the Roll might be amended at Common Law at any Time; for the Original is a Record of itself, and the Entry of it on the Roll is only *Ex abundanti*, tho' the Usage is to enter it.

3 Rep. 157.

So during the Term, the Court might amend any Mistake in the Roll at Common Law, for the Roll is only the Remembrance of the Court during the Term.

But at the Common Law after the Term, the Court could not amend any Fault in the Roll, for then the Record is not in the Breast of the Court, but in the Roll itself.

Williams versus Hoskins. Mich. 3 Annæ B. R.

1 Salk. 52.
By the Name
of *Bucksome*
v. *Hoskins*.
Mod. Cases,
263, 310.
See Cro. El.
760.
Cro. Car.
162.
1 Roll. 197,
797.
2 Cro. 372.
which per
Holt, Ch. Just.
is a hard
Strain.
Sid. 7. 12.

THE Plaintiff obtained Judgment in Ejectment for two Houses, and brought a Scire Facias on that Judgment, to shew Cause why he should not have Execution of one House; the Defendant pleaded Nul tiel Record, and the Plaintiff perceiving the Fault, moved to amend it. Sed per Curiam, This Scire facias is a good Writ, there is no fault in it to amend, and the Court will not alter it to fit it for the Plaintiff's Purpose in this Judgment, when 'tis probable there may be another Judgment in Ejectment for one House, and the Defendant having taken Advantage of it, it shall not be amended to falsifie his Plea.

AMERCIAMENTS and FINES.

Amongst the Antients all Punishments were Pecuniary, from whence the Latines properly say, *Solvere pœnas*; but in Process of Time this Sort of Punishment became contemptible, and then for some Crimes Death ensued.

Brañon 129.

All Amerciaments and Fines belong to the King, thus Fines upon Original Writ, and Fines pro licentia concordandi, and the Reason is, because the Courts of Justice are supported at his Charge; and wherever the Law puts the King to any Charge,

for the Support and Protection of the People, it provides Money for that Purpose, and this is called, *Veſtigal Judicarium*.

An Amerciament is ordered by the Court, but aſſeſſed by the Jury, and a Fine is not only ordered, but aſſeſſed by the Court; and as for theſe Amerciaments, which are ordered and aſſeſſed by the Court, upon Officers, who are in Contempt, or in Default of their Duty, theſe ſeem to be rather Fines than Amerciaments, tho' they are commonly ſo called; and yet it hath been held, that where a Pecuniary Penalty is aſſeſſed by the Court upon an Officer, 'tis properly an Amerciament, but when on a Stranger, 'tis a Fine.

Where the Defendant is found guilty of a Misdemeanor upon Indiament, and fined, he cannot move to mitigate the Fine unleſs he appear in Perſon; but he may be fined tho' abſent.

Wherever a Fine and Ransom is mentioned in a Statute, the Word Ransom imports a Sum treble to the Fine, tho' my Lord Coke in his Littleton tells us 'tis the ſame Thing.

Where a Statute impoſes a Fine at the Will and Pleaſure of the King, that muſt be intended, of his Judges, for 'tis by them the Fine is impoſed.

Where a Statute impoſes a Fine certain upon any Conviſion, the Court cannot mitigate it; but if the Party come in before the Conviſion and ſubmits himſelf to the Court, they may aſſeſs a leſs Fine, for he is not convicted, and perhaps never might.

But tho' the Fine is certain, yet the Court of Exchequer may mitigate it, becauſe 'tis a Court of Equity, and they have a Power by Seal for it.

At a Court-Leet the Steward told W. R. he was a Reſiant, who replied, he lied, thereupon the Steward fined him 20 l. and adjudged good without a Preſcription ſo to do, and Debt lies for this fine. But if he fine the Jury for a Contempt, he muſt fine them ſeverally, for the Contempt of one is not the Contempt of the other.

8 Rep. 40.

1 Vent. 205, 270.

Dyer 232. a.

1 Inſt. 127.

4 Inſt. 71.

1 Roll. Rep. 194. *Wray's* Caſe.

Cro. Eliz. 581.

1 Roll. Rep. 32.

ANTIENT DEMESNE.

Hunt *versus* Browne. Hill. 1. Annæ.

1 Salk. 57,
144.

1 Lutw.

Where a
Recovery,
suffered in a
Court of An-
tient De-
mesne with
double
Voucher, is
a good Bar
to an Estate
Tail.

THIS Case is put at large in 1 Lutw. and in arguing it Holt, Ch. Just. held, That a Recovery in Antient Demesne with double Voucher, is a Bar to an Estate-tail, as it is in the Court of Common Pleas, for a good Foundation of such a Custom must be supposed, and 'tis that which hath given this Conveyance such Effect and Operation; so likewise a Recovery by Default in that Court is a Discontinuance, as 'tis in the Common Pleas, and a Fine likewise is a Discontinuance, but no Bar, and as to that Point 'tis not material, whether the Court is a Court of Record or not; for if the Action sued there will recover a Freehold, the Discontinuance is a necessary Effect of such a Recovery, for every Recovery recovereth a Fee-simple, and every Recovery of a Fee-simple works a Discontinuance, and therefore a Fine levied in this Court (if 'tis a Fine) must be of the same Consequence and Effect as other Fines are, and certainly a Fine may be levied of Lands in Antient Demesne, in the Court of the Lord of the Manor, upon a Writ of Right Close, for 'tis agreeable to the Power of that Court in other Instances; as for Example, that Court may try the Mife joined upon a Writ of Right, which hath the same Effect upon a Non-claim as a Fine hath; and the Tenants of such Lands would be under this great Disadvantage, that no Fine at all would be levied of their Lands, if it might not be levied in that Court, but their Privileges can never be intended to be to their Disadvantage: To all which the Court agreed.

Kite *versus* Laury. Hill. 7 Will. III. B. R.

1 Salk. 56.

By the Name
of Barker v.
Wich.

'Tis the Te-
nure that is
traversable,
and not the
being plead-
able in the
Lord's Court.

IN Ejectment the Defendant pleaded, that the Manor of Bray is Antient Demesne, and that the Lands in Question are held of the said Manor, and pleadable by Writ of Right Close in the Court of the Lord of the Manor. The Plaintiff replied, that the Lands were in the Parish of Bray, and

and were Frank-Fee and pleadable at Common Law, and traversed, that they were pleadable in the Court of the Manor; and upon a Demurrer to this Replication it was argued, that the Precedents were otherwise, for 'tis the Tenure, and not its being pleadable in the Court of the Manor, which is traversable; for that is but a Consequence of the Tenure, to which the Court inclined, saying, that where Antient Demesne is pleaded, in such Case the Party (to make a full Defence) must either take Issue upon it, or traverse the Tenure of the Manor, or that there was a fine levied, or Common Recovery suffered, and so rely upon the Estoppel, and pray Judgment, whether he shall answer to it as Antient Demesne, contrary to such Fine or Recovery: And Note, That where Antient Demesne is pleaded, the Defendant must alledge, that the Lands are held of such Manor which is Antient Demesne, and not that they are Parcel of such a Manor which is Antient Demesne.

Zouch versus Thompson. Mich. 9 Will. III. C. B.

A Fine being levied of Lands in Antient Demesne, the Lord brought a Writ of Disceit against the Tenant, and against the Heirs of the Cognisee and the Heir of the Cognisor, seven Years after the Fine had been levied; and declared generally, that he was Lord of the Manor at the Time of the Fine levied, and yet is Lord thereof, without shewing any Estate specially; and in this Case these Points were resolved, (1.) That a Writ of Deceit lies against the Cognisee himself as well as against the Cognisor, because he is a Party to that Fine which works a Wrong and Prejudice to the Lord of the Manor. (2.) That this Writ lies against the Heir of the Cognisor or Cognisee, because the Fine worked a real Deceit and not a personal Tort only; which dies with the Person of the Tort-feisor, as in non Summons, for it being a Wrong by which the Lord is disinherited and barred of his fines and other Duties arising from the Courts of his Manor, it shall by no Means die with the Person of the Wrong-doer. (3.) That the Lord need not shew any Estate in particular, 'tis sufficient that he was Dominus pro tempore, and if his Estate should determine by Alienation, the Tenant ought to plead it Puis darrein Continuance. (4.) The five Years Non-claim is not material, because a Fine may establish the Right of another, but can never establish its own Defeas. (5.) This Fine is coram non iudice, and meerly void: See Br. Fines 47. Br. Descent 14. 21 Ed. 3. 20. 7 H. 4. 28. 1 Leon. 290. Herne's Pleader 93.

3 Lev. 417,
419.
Where a
Writ of De-
ceit lies a-
gainst the
Cognisee as
well as a-
gainst the
Cognisor of
a Fine.

Savery *versus* Smith.

² Lutw.
The Plain-
tiff in her
Replication
pleading An-
tient De-
mesne needs
not set forth
what Title.

IN Replevin for taking his Cattle, &c. The Defendant made Conscience for Toll in Highworth-Market, demanded of the Plaintiff, which he refused to pay, and thereupon he justified the Taking the Cattle; the Plaintiff replied, that he is Tenant of the Manor of *Hanningdon* in *Wiltshire*, which is Antient Demesne, and that Tenants of Lands in Antient Demesne are quit of Toll in all Places, &c. and upon a Demurrer to this Replication it was insisted for the Defendant, that the Plaintiff had not made a good Title to this Privilege, because he only set forth, that he is Tenant of the Manor which is Antient Demesne, when he should have declared, that he is seised in Fee of such Lands, &c. which he held of T. F. as of his Manor of *Hanningdon*, which is Antient Demesne: But per Curiam, 'tis not necessary for such Tenants to set forth what Estates they have, either in Fee-simple or otherwise; 'tis sufficient for them to alledge, that *Homines & Tenentes de antiquo Dominico* ought to be discharged of Toll, &c. then it was objected, that the Plaintiff had laid this Privilege too general, for it was to be discharged of Toll generally, and in all Places, &c. when by Law Tenants in Antient Demesne are not discharged of Toll, but only of such Things which arise on their own Lands, and which are for the Support and Ease of them and their Families; and the Reason of this is, because these Lands were formerly in the Possession of King Edward the Confessor, or King William, called the Conqueror; and therefore in the *Domesday-Book*, which was made in the 20th Year of the Reign of his Reign, they are called, *Terræ Regis Edwardi*, and those in the Possession of King William are called *Terræ Regis*; and when any of these Lands were alien'd from the Crown, the Tenants were obliged by their Tenure to manure the King's Demesnes, and therefore to encourage them in that Labour, they had this Privilege to be discharged of Toll of all Things which did arise or grow on their own Lands; but when they turn Merchants and Traders in other Things, they are not within the Reason of this Privilege; sed per Curiam, to be quit of Toll in Places, shall be intended of such Things in all Places where he is Tenant.

¹ Leon. 231.
Cro. Eliz. 10.
Ward *versus*
Knight.

A P P E A L. *See Restitution.*

By the Common Law a Female might have an Appeal as Heir to any Ancestor as well as the Male; but now, by * Magna Charta, 'tis enacted, that nullus capiatur vel imprisonetur propter appellam faminae de morte alterius quam viri sui. * Cap. 34.

And where a Woman brings an Appeal of the Death of her Husband, ne unques accouple in loyal Matrimony is a good Plea; so is a second Marriage, but an Elopement is not.

It lies at any Time within the Year and Day, to be accompted from the Death, and not from the Stroke given; but an Appeal of Robbery may be brought after the Year. Mich. 13 Car. James Gower's Case. ^{2 Inst. 318. 4 Rep. 42. 4 Leon. 16.}

In an Appeal of Felony, a Nonsuit after Appearance is peremptory, and so it is in an Appeal of Maihem, because the Writ is felonice maihemavit. ^{1 Inst. 139.}

In an Appeal of Murder, the Defendant cannot justify se defendendo, but must plead Not guilty, and the Jury shall find the Special Matter; but in Cases not capital, as Mayhem, &c. he may justify se defendendo, but not in Defence of his Goods; for if he plead Not guilty, he cannot give se defendendo in Evidence. ^{2 Inst. 316.}

In an Appeal, the Defendant having pleaded to Issue, may nevertheless waive it, and demur upon the Count; for the Trial would be in vain if that fail; and yet if the Demurrer be adjudged against the Defendant, the Judgment is only to answer over. ^{Cro. Eliz. 196. Haine's Case.}

The Father attainted of Felony, was slain by one who had no Authority, the Wife shall bring the Appeal and not the Heir, for hæres est nomen juris, but Uxor est nomen naturæ, and the Attainder of the Husband cannot extinguish that natural Relation which is between Man and Wife, tho' it may that civil Relation which is between Ancestor and Heir. ^{7 Rep. 13. Sid. 196.}

In an Appeal against four by Writ, the Defendants appeared at the Return, and the Plaintiff offered to declare against them as in Custody: Sed per Curiam, they are not in Custody upon their Appearance, but there must be a Committitur or Bail filed, upon which the Plaintiff was called, and Nonsuit. ^{Cro. Eliz. 605. Holland's Case.}

An Infant brought an Appeal per Guardianum, and at the Day it was prayed, that the Guardian might not be demanded for three or four Days being sick; but per Curiam, it was denied, and so the Infant lost his Appeal. ^{Noy 88. Latch 175.}

Prince *versus* Bawd. Mich. 5 Will. III.

* Dyer 284.

Appéal of Murder, the Defendant pleaded Auterfoits *collata* for the same Offence, and the Oyer of the Record and Conviction being demanded, it was moved, that it might be entered * in hæc verba : Et per Curiam, Oyer of the Record was granted, but it shall not be entered in hæc verba, because it is a Record of the same Court ; now, upon the Oyer, several Variances appeared, so that it was objected, that the Defendant had failed of his Record, upon which it was prayed to amend, being all in Paper ; but on the other Side it was objected, that Auterfoits convict was only pleaded for Delay, for 'tis no Bar within the Statute 3 H. 7. But it was ruled, that before that Statute Auterfoits convict or acquit were good Pleas in Bar of an Appeal, and that the Statute has only the two Pleas of Auterfoits acquit or attain, but that Auterfoits convict remains as at Common Law.

Hoile *versus* Pitt.

4 Mod. 158.
Amendment
not allowed
in criminal
Cases.

In an Appeal of Murder, the Defendant pleaded a Conviction for Manslaughter at the Sessions held in the Old Baily, and that he had his Clergy ; and before any Demurrer to this Plea, or Issue joined, there being a Fault apprehended, because the Defendant did not set forth by what Authority the Court at the Old Baily was held ; thereupon the Defendant, by his Council, moved to amend his Plea : Sed per Holt Ch. Just. the Appellant himself cannot amend, and the Reason is the same why the Appellee should not ; for in this Case, by an Amendment, a new Roll is made, whereas in other Cases Amendments are made when all is in Paper ; and no Statutes extend to Amendments in Appeals in criminal Causes.

Bauson *versus* Offley.

3 Mod. 121.
Where the
Wound was
given in one
County and
the Death
was in ano-
ther County.

In an Appeal brought by the Wife for the Murder of her Husband ; she declared, that on such a Day and Year one Offley did Assault and Wound her Husband in the County of H. of which Wound he afterwards, on such a Day, died at R. in the County of C. and that one Lippon was assisting the said Offley, &c. The Cause being tried, the Jury found that Lippon gave the Wound, and that Offley was assisting him ; and now, upon a Motion in Arrest of Judgment it was insisted for the Appellee, that

that the Count and the Verdict in Appeals must be certain, otherwise no Judgment could be given against the Appellee; but here the Verdict found another Person gave the Wound, and not he against whom the Appellant had declared. Sed per Holt, Ch. Just. This is an Exception which might as well be made to an Indictment, as to a Count in an Appeal, for the one ought to be as certain as the other; but in this Case 'tis certain enough, for he who gave the Stroke, and he who was assisting in it, are both equally guilty: Then it was objected, that the Cause was tried in a wrong County; for it was by a Jury in C. when it ought to be by a Jury of both Counties, since the Wound was in one County, and the Death in another. Sed per Curiam, by the Statute * 2 & 3 Ed. 6. 'tis enacted, that an Indictment found by a Jury of that County where the Death happens, shall be as effectual in Law as if the Wound, which was the Cause of such Death, had been given in the same County. * Cap. 24.

Culliford's Case.

THE Defendant being indicted for Murder, was found guilty of Manslaughter at the Assizes, and an Appeal was immediately brought; the Judge gave the Appellee Time to plead till next Assizes, but in the mean Time the Appellant brought an Habeas Corpus & Certiorari, to remove both the Body and the Record into B. R. and afterwards the Parties agreed, and the Appellee being bailed, he appeared in Court upon his Recognisance and produced a Release from the Appellant, and thereupon moved to be discharged, there being a Counsel for the Appellant, and consenting to it. Sed Holt, Ch. Just. The Court will be possessed of the Record before he shall be discharged; therefore let the Habeas Corpus & Certiorari be returned, and the Return filed, then the Appellee must be arraigned, and afterwards he may plead this Release; but if the Appellant is not ready at the Return of the Certiorari to arraign his Appeal, or doth not appear in Person, the Appellee may have a Scire facias to compel him, and if he doth not come in upon the Return of such Scire facias, he shall be demanded and be Nonsuit: But the Appellee is not yet to be discharged, because there is a Record against him in Court, and therefore he must be arraigned upon the Indictment, and then he may plead Autrefois acquit, &c. Mod. Cases, 219.

APPURTAINING.

Dyer 362.
Co. Ent. 384.
Cro. Car. 169.

LANDS may be said to be appurtenant to an House, either in the King's Case, or in the Case of a Common Person, when they have been let and possessed together a convenient Time.

Yelv. 159.

A Way cannot be appurtenant or appendant, as a Common may, because 'tis not an Interest, but an Easement.

1 Inst. 121.

The Thing which and to which 'tis appurtenant must agree in Nature and Quality; as Turbary may be appurtenant to an House, but not to Lands, a Leet to a Manor, but not to a Church, a Seat in a Church to an House, but not to Land; so an Advowson shall not be appendant to the Services, but to the Demesnes of a Manor, for the Demesnes are of a perpetual Duration, but the Services are not.

A Vicaridge may be appendant to a Manor, because 'tis derived out of the Rectory of Common Right; and yet by a Grant it may be annexed to a Manor.

Sid. 24, 211.
1 Lev. 31.

W. R. sells a Mill cum pertinentiis, the Jury find a Kiln was occupied with the Mill for many Years. Sed per Curiam, that Kiln shall not pass by those Words, for it might be a Lime-Kiln, and may have no Relation to the Mill; but if the Jury had found it to be a Salt-Kiln, it might be otherwise.

Rex versus Bishop of Chester.

Antea Tit.
Advowson,
S. C.

AN Advowson is appendant to a Manor, the Owner mortgages the Manor in Fee, except the Advowson, 'tis now become in Gross, but if the Money is paid on the Day, 'tis become appendant again, and if 'tis paid after the Day, the Advowson is appendant in Reputation; so that it may pass in a Grant by the Name of an Advowson appendant, tho' per Hole Ch. Just. in Truth the Appendancy is destroyed.

Reynalds versus Blake. Pasch. 9 Will. III.

Antea Tit.
Advowson,
S. C.

TWO Coparceners of a Manor; the Demesnes are allotted to one, and the Services to the other, the Manor is gone and the Advowson becomes in Gross; but if one die without Issue, and the Manor descend to her who had the Services,

per Holt, Ch. Just. the Manor is revived again, and the Ad-
vowson becomes appendant as it was before, for the Severance
was by Act in Law.

APPRENTICES. *See In-* *dictment 17, 21. Travers 8.*

Punting's Case.

AN Order to discharge an Apprentice was quashed, because it was to the Trade of a Tallow Chandler, which is a Trade not mentioned in the Statute; besides it was under the Hands and Seals of three Justices, when that Statute requires there should be Four.

Order to discharge an Apprentice quashed.

Peck's Case. Mich. 10 Will. III.

THE Master took an Apprentice in Husbandry, and before the Time of Apprenticeship expired the Master died, and left the Apprentice impotent and a Cripple, the Justices made an Order, that the Executors of the Master should receive and provide for this Apprentice; but this Order was quashed, because it did not appear that they had Assets, or that they lived in the same County; and by Justice Giles Eyre, this is a personal Trust, and determines upon the Death of either the Master or Apprentice, and the Executors may be of no Trade, or of another Trade than the Master was; but he held, that an Action of Covenant would lie against the Executors, but then the Plaintiff must prove Assets. And per Holt, Ch. Just. by the Custom of London in such Cases, the Executors shall put out the Apprentice to another Master of the same Trade; and in other Places, where a Master hath a great Sum with an Apprentice, and covenants for his Instruction and Maintenance, it would be hard to construe his Death to be a Discharge of

1 Salk. 66. Where the Master dies his Executors having Assets shall provide for the Apprentice.

those Covenants; and that it hath been adjudged, that tho' the Covenant for Instruction may fail, yet he still continues an Apprentice with the Executors or Administrator, to be maintained by them.

Anonymus.

Mod. Cases,
70.
The Master
brought Co-
venant a-
gainst the
Apprentice
for departing
at such a
Time.

THE Master brought an Action of Covenant against his Apprentice for departing out of his Service at such a Time. The Defendant justified by Vertue of a Licence from his Master to depart at that Time; and Issue being taken upon the Licence, Holt, Ch. Just. held, that upon such a Declaration the Master shall not give Evidence of the Defendant's departing without Leave at any other Time, because in this Case the Time is material and not transitory, as in Trespals and other Cases.

White *versus* England.

4 Mod. 145.
Debt upon
the Statute
for the using
the Trade of
a Tiler, not
setting forth,
that it was a
Trade used
in England,
at the Time
when the
Statute was
made.

DEBT upon the Statute 5 Eliz. for using the Trade of a Tiler, not being Apprentice to that Trade for seven Years. The Defendant pleaded, that his Father was a Freeman of London, and that he (this Defendant) was his eldest Son; and that by Vertue of a Custom in London, the eldest Son of a Freeman in re patrimonii might use his Father's Trade. The Plaintiff demurred to this Plea, and the Counsel for the Defendant did not insist upon it, but objected, that the Declaration was ill, because the Plaintiff did not aver, that the Trade of a Tiler was an Art or Mystery used in England, at that Time when the Statute was made. Sed per Holt, Ch. Just. the very Trade is mentioned in this Statute, and therefore it must necessarily be intended, that it was used at that Time.

The Queen *versus* Collingwood.

Mod. Cases,
288.
Inticing an
Apprentice
to take away
his Master's
Goods, not
Criminal un-
less some
Goods were
actually ta-
ken away.

THE Defendant was indicted, for enticing an Apprentice to take away his Master's Goods, which he (the Defendant) did receive, &c. Upon Not guilty pleaded, the Defendant was found guilty; but upon a Motion in Arrest of Judgment, it was held per Holt, Ch. Just. that the Indictment was ill, because it did not set forth, that the Apprentice did actually take away any Goods; for an Enticement is not Criminal, without something done in Pursuance of it: 'Tis true, this Indictment sets forth, that the Defendant did receive the Goods, which implies that they were taken away, for otherwise they could not be received; but
a Charge

a Charge in an Indictment must be positive, certain and direct, and not by Implication.

APPROPRIATION.

AN Appropriation of an Advowson, Church, Glebe, Tithe, &c. must be to some Body politic or Corporation; and when it was made by the Patron or first Founder, the Form was thus: Ego W. R. de H. concessi Ecclesiam & advocacionem meam de H. cum terris & decimis omnibus ad eam pertinentibus Abbati de S. &c. so that not only the Advowson and Profits of the Church, but the Incumbency it self, which is a spiritual Thing, vested in the Appropriator. Plowd. 495.

At Common Law an Appropriation could not be made but to a Body Politick, or to a Corporation, for a natural Person is not capable of it, because he cannot be perpetual, and an Appropriation makes an Incumbent perpetual.

And at Common Law it could not be made to a Lay Person, for as he could not be an Incumbent by a Presentation, so he shall not by an Appropriation, which is but a more lasting Incumbency.

These Appropriations at first were made to Abbots, Deans, and sole Corporations, who might administer Sacramentals, and had Cure of Souls; but afterwards by Dispensations they were made to spiritual Corporations aggregate, who had no Cure of Souls, as to Deans and Chapters, and at last to Nuns under Pretence of Hospitality. Grande nefas, as Dyer calls it. Plow. Com. 497.

An Appropriation cannot be granted over, for 'tis an Incumbency, which is a spiritual Thing, 'tis included in the spiritual Fundion, which being of the highest Trust, cannot be transferred. Hob. 307.

It cannot be made without the Patron, for his Advowson being a Lay Inheritance, cannot be divested without his Consent, neither can it be made without the Consent or Concurrence of the King, because the Advowson it self is held of him mediately or immediately, and he shall not lose his Possibility of Escheat or Lapse, without his Consent, but an Appropriation may be made by the Patron, and the King acting as supreme Ordinary, without the Bishop; and the Reason is, because, before the Reformation it might have been made by the King, by the Patron and the Pope, and whatever the Pope might have done, is now vested in the King by the Statute of H. 8. Appropriation cannot be made without the Patron.

ARBITRAMENT.

Umpirage:

Where an Umpire is to be chosen by the Arbitrators, the same Time may be limited to the Umpire as was limited to them to make their Award; for by choosing an Umpire they determine their own Power.

2 Vent. 116.
Sid. 428.
2 Saund. 127.
Mod. 275.
Jones 167.
1 Roll. 262.
contra;

Where a Submission was to the Award of A. and B. ita quod they make it by such a Time; and if not then, to the Sentence of such Umpire as they shall choose; ita quod he make his Umpirage in the same Time; an Umpirage so made is good, because here was no concurrent Authority, for by choosing an Umpire the Arbitrators had determined their own Power; and therefore, tho' the Arbitrators should make an Award after they had chosen an Umpire, the Umpirage shall be good, but the Award void.

The Law is the same, if the Umpire was appointed by the Parties themselves; for 'tis not an absolute and concurrent Jurisdiction, 'tis only a Power given to the Umpire to act, and that his Umpirage shall stand, if the Arbitrators do not act and make an Award.

Pursuant to
the Submission.

Palm. 109,
112, 121.

1 Bulst. 110.

2 Cro. 277,

399.

1 Roll. Rep.

223.

Yel. 203.

1 Vent. 50.

Where the Submission is ita quod the Award is made under Hand and Seal, and the Award is only written, but not subscribed, 'tis void; but if the Arbitrator make his Mark, 'tis sufficient.

The Submission was to an Award of W. R. and three more, ita quod it be made by all four, three, or two of them, in such Case an Award made by two or three of them is good, because the joint Authority which was first given to all four, was distributed by the ita quod, &c. and an Authority may be divided, tho' an Interest cannot.

Palm. 108.

A. and B. submitted all Controversies concerning their Title in H. a Sum of Money was awarded to one, and that he should Release all Actions; the Defendant to avoid this Award, avers there were other Actions: Sed non allocatur, for it shall be intended only of such Actions as they had Power over by their Submission; and if he should be sued for not releasing any Action which doth not concern this Title, he may plead the Award as to that was void.

Freeman *versus* Bernard. Hill. 8 Will. III. B. R.

CASE on an Agreement, the Defendant pleaded a Sub-
mission, &c. and an Award made to sign mutual Releases,
adjudged an ill Plea; for 'tis not intended, that the Breach of
the old Agreement should be discharged by this Award, but by the
Release; 'tis otherwise where the Award it self discharges the old
Duty and gives a new one.

1 Salk. 69.
Plea of an
Award to
sign mutual
Releases, not
good.

A R R E S T.

Brown *versus* Burlace. 9 Will. III. B. R.

(1.) **I**N this Case it was held, that the Temple is extraparochial,
and not within any Parish, that 'tis not within the City of
London, so as to come within the Customs, but 'tis within the
County of the City, but that the White Fryars was within the
Jurisdiction of the City.

The Temple
is extraparo-
chial, but an
Arrest there
was not set
aside.

Postea Privi-
lege 12. S. C.

That both Dugdale and Stow tell us, that the Temple is pri-
vileged from Arrests by the Grant of the King: Sed per Holt Ch.
Just. If the King hath made such a Grant, 'tis void, because the
Templers have no Court of Justice within themselves, yet the
Court inclined not to countenance Arrests in the Temple in
Term-time; but would not set aside the Arrest of the Defendant,
who was arrested in the Temple, and so he was held to Special
Bail.

Anonymus. Pasch. 7 Will. III. B. R.

ADjudged, that a common Bailiff is not bound to shew his
Warrant, either at the Time of the Arrest, or at any Time
after; but he is bound to shew the Cause of the Arrest, and at
whose Suit; but a Special Bailiff may be required to shew his
Warrant.

Moor 767.
6 Rep. 54.
9 Rep. 69.
A common
Bailiff is not
bound to
shew his
Warrant,
but a Special
Bailiff is.

Warrant, for he is not known as a common Bailiff is, and no Man is bound to submit himself to one who is not known or presumed to have an Authority.

3 Cro. 180,
408.
Moor 711.
Sid. 229.

If a Writ is returnable, 9 Feb. or Octab. per. the Defendant cannot be arrested by Vertue of such Writ, either on the 10th or 11th of February, tho' 'tis before the Quarto die post. if he is arrested, the Officer cannot justify it, either in Trespass or False Imprisonment brought against him; but if the Defendant be taken on a Ca. Sa. on the ninth Day of February, which is the very Day the Writ was returnable, the Arrest is good.

Paes Will. 3.

Where a Capias is awarded against W. R. and a Common Bailiff knows the Writ to be in the Hands of the Sheriff: Per Holt Ch. Just. he may arrest W. R. without actually having the Warrant.

9 Rep. 66.

An Arrest in the Night is good.

Bull. 85.

One arrested in Westminster-Hall, sedente Curia, may be discharged upon Motion, if the Arrest was on Mesne Process, but not if he was taken in Execution, but even in that Case the Officer is punishable per Curiam.

In Cases of Peers and Corporations the Process is a Distringas, for they cannot be arrested.

Assault and Battery.

Adjudged, that the Defendant may justify an Assault in Defence of his Person, or of his Wife, because they are but as one Person; so he may in Defence of his Master, because Protection and Allegiance is due to him.

So he may justify in Defence of his Father or Mother, Children within Age; and even a * Wounding may be justified in Defence of his Person, but not of his Possessions.

* 1 Roll.
Rep. 19.

Hill. 8 Will. 3.
B. R.

In Assault, &c. the Defendant may justify the Assault to save his Person, but not to defend his House or Possession; for in such Case he must plead Molliter manus imposuit; but the Law seems to be, that he may justify an Assault in Defence of his House, tho' in such Case he cannot justify any Wounding.

2 Roll. 548.
Latch 20.

In Trespass for a Battery and Wounding, Son assault demesne is a good Plea, for in this Action the Trespass is the Principal; but in Mayhem 'tis not a good Plea, unless it appear, that the Assault was such as endangered his Life, for a Man cannot justify a Mayhem for every Assault; as for Instance, a Man cannot justify drawing his Sword, and cutting of the Hand of another, because he struck him; but in such Case the Defendant ought to plead the Assault specially (viz.) That the Plaintiff assaulted him and knocked him down, &c. Et si malum aliquid evenit, &c. de injuria sua propria, &c.

Son Assault Demesne, a good Plea for a Battery and Wounding, but not in Maihem.

3 Cro. 268.
2 Roll. 547.

A Master may justify the Beating his Apprentice, Servant, Scholar, &c. if the Beating is in Nature of Correction only, and with a proper Instrument, otherwise immoderate castigavit is a good Reply; and so it was adjudged in Keits's Case per Holt Ch. Just.

Assault and Battery; the Defendant justified, for that the Plaintiff was his Apprentice, and that he tempore quo, &c. gave him gentle Correction, and traversed that he was guilty at any Time before or after he was his Apprentice; and upon a Demurrer to this Plea it was adjudged ill, because the Defendant ought to shew some Cause specially, or the Fault for which he beat his Apprentice, and then conclude absque hoc, that he beat him before or after that Time.

The Defendant justified, that he gave his Apprentice gentle Correction, but did not say for what.

Assignment on the Statute 32 H. 8. cap. 34.

THE Lessor made a Lease for Years, and afterwards assigned his Reversion to W. R. Adjudged, that all Conditions and Covenants between the Lessor and Lessee which concern the Thing demised, or Rent reserved; as for Instance, Conditions or Covenants for repairing, &c. paying the Rent, &c. are annexed to the Reversion by this Statute, and pass with it to the Assignee, so that he may take the same Advantage of them as the Lessor himself might have done before he made any Assignment; but not any collateral Covenants, as to pay a

Conditions and Covenants which run with the Land, are annexed to the Reversion, and go to the Assignee.

Sum

Sum in Gross, &c. are transferred to the Reversion by this Statute.

Adjudged, that a Bargainee is an Assignee within this Statute; and so, if he grant his Reversion to the Use of W. R. and his Heirs, the cestui que Use, and the Bargainee, are in by this Statute as Assignees, for they are in by the Limitation of the Grantor, and quoad him they are Assignees.

Who is an Assignee within this Statute.

1 Inst. 215.

If a Man makes a Lease for Life to A. and afterwards grants the Reversion to B. either for Life or Years, B. is an Assignee within this Statute; but if he grant the Reversion only of two Acres, or Part of the Land, he is not an Assignee within this Statute to take Advantage of Conditions, because he hath but Part of the Reversion, (i. e.) a Reversion in Part of the Demise, and the Conditions being entire, and against Common Right, cannot be apportioned.

1 Lev. 22.

The Assignee of a Rent without the Reversion, may maintain an Action of Debt for the Rent, if there was an Attornment made, so by that and the Assignment a Privy of Contract passes.

Tho' the Lessee assigns, yet the Lessor may have an Action of Debt for the Rent, and so may his Executor, for there is a Privy of Contract between them.

Sid. 127.

But the Heir of the Lessor cannot maintain an Action of Debt, because the Estate is not in him, but in the Assignee, and there is no Privy of Contract between them.

Debt for Rent was brought against an Assignee; the Defendant pleaded, that he assigned over his Lease; this is ill, unless he shew also, that the Lessor had Notice of the Assignment, and that there was nothing due at the Time of the Assignment; but Covenant will lie against the Lessee, after such an Assignment and Acceptance of Rent.

Attachment Foreign.

Masters *versus* Lewis. Trin. 7 Will. III. B. R.

A Creditor of W. R. attaches Money in the Hands of the Ordinary. Adjudged, that it could not be, for a Foreign Attachment cannot charge any other Person than the Debtor himself, which the Ordinary is not, before Goods of the Intestate come to his Hands, for no Creditor of the Intestate can sue him till he hath actual Seisin, and before such Seisin he hath so little Interest in the Matter, that he can neither release or bring the Action; but Goods in the Hands of an Executor or Administrator may be attached by a Foreign Attachment, because they are Debtors; and yet by this Means a Debt upon Simple Contract may be paid before a Debt upon Specialty.

5 Mod. 25,
92.
Foreign At-
tachment
charges on-
ly the Debt-
or.

Ingram *versus* Bernard. Hill. 13 Will. B. R.

THE Arbitrators made an Award, that W. R. should pay so much Money on the second Day of January, he having given a Bond to perform the Award that was attached on the first Day of January, and the Money awarded was taken upon that Attachment on the second Day of January. And per Holt, Ch. Just. This would have been a good Plea in an Action of Debt brought upon the Award, but not to an Action of Debt brought upon the Bond of Submission, because the Bond is forfeited; and when a Bond is forfeited, 'tis not the Money in the Condition, but the Money in the Bond it self which is attached.

Money a-
warded was
attached.

A Debt due by Judgment obtained in the Courts of Westminster, whether the Action was for Debt or Damages, cannot be attached by the Custom of London.

1 Roll. 552.

A Creditor of W. A. attaches his Debt in the Hands of W. S who was indebted to the said W. A. and this being removed into B. R. by Certiorari, a Procedendo was granted, because the Party cannot have the like Remedy in B. R. as he may in Lon-

1 Roll. Rep.
268.
Where a
Procedendo
was granted
after an At-
tachment.

don. Et per Curiam, if A. should sue W. here, and the Defendant should plead the Foreign Attachment, we will allow the Custom, because it comes in by way of Plea; but where it comes by way of Original Suit we cannot do Right to the Parties, therefore a Procedendo was granted.

ATTORNEY.

1 Inst. 128.
8 Rep. 58.

IN all Actions at Common Law, and in all Courts, both the Plaintiff and Defendant appeared in Person; for the Writ commanding them formerly to appear, it was understood an Appearance in Person, and therefore the Entry is still Quærens obtulit se, by which Policy there were many vexatious Suits prevented and avoided; for the Parties were compelled to follow their Suits in proper Person, and could not otherwise prosecute, unless they had the King's special Warrant for that Purpose.

F. N. B. 25. c.

But tho' the Parties could not appear by Attorney, yet after Appearance, and when the Suit was in any of the Superior Courts at Westminster, they had Power to allow them to proceed by Attorney; but in other Courts that Privilege was not allowed, but the Party must sue out a Dedimus potestatem de Attornato faciend'.

Action for
his Fees.

One who is Attorney of Record, may bring an Action of Debt or an Action on the Case for his Fees; but he, who is not an Attorney of Record, can only have an Action on the Case.

Allen 4.

3 Jac. cap. 7.

Assumpsit by an Attorney, in which he declared, that the Defendant promised to pay his Fees; the Defendant pleaded the Statute 3 Jac. and that the Plaintiff had not given him a Bill under his Hand; and upon a Demurrer to this Plea the Plaintiff had Judgment, because the Statute doth not extend to a special Action upon the Promise.

Anonimus. Trin. 2 Annæ.

Where an
Attorney ap-
pears with-
out a War-
rant and
Judgment is
had against
his Client, it

IF an Attorney appear, and Judgment is against his Client, and he had no Warrant of Attorney from him to appear, the Question was, if the Court would set aside the Judgment. Et per Curiam, If the Attorney is responsible, it shall not be set
2 set
shall not be set aside, if the Attorney is responsible.

set aside, because the Judgment was regular ; and there is no Reason that the Plaintiff should suffer when he is not in Fault : But if the Attorney is not responsible, or suspected to be unable, the Judgment shall be set aside, for otherwise the Defendant has no Remedy.

ATTORNM ENT.

Quarn *versus* Rowe. Hill. 5 Will. III. B. R.

This Case is reported in 1 Salk. by the Name of Gwam & al' *versus* Roe, but not in the following Manner, which was thus :

H. Tenant in Tail made a Lease to W. R. to commence five Years after, but in the mean Time he levied a Fine to L. R. to the Use of the Conusee and his Heirs ; afterwards the Lessee entered by Virtue of this, and the Conusee brought an Action of Debt against him for Rent arrear reserved on the said Lease ; and upon a Demurrer to the Declaration it was objected, that it was ill, because the Plaintiff did not set forth any Attornment, and he being in by the Common Law, and not by the Statute of Uses, an Attornment is necessary to create a Privity and to support this Action : But this Objection was not allowed, because the Lessee having only an Interesse Termini at the Time of the Fine levied, could not attorn ; and the Reversion upon his Term passed at that Time as included in the Possession.

Where an Attornment is necessary to create a Privity.

W. R. made a Lease to B. for fifty Years, and afterwards granted his Reversion to R. then B. assigned the Term to R. before any Attornment, and before he had Notice of the Grant of the Reversion : Adjudged, that the whole Estate is vested in R. immediately, and that the Term is extinguished ; for in this Case there is no Body to attorn, and therefore the Law vests all in R. without any Attornment.

1 Vent. 248. The Lessor granted the Reversion to another, and afterwards brought an Action of Debt for the Rent; the Lessee pleaded, that he had granted away the Reversion, but did not set forth that he attorned; adjudged, that this Plea of it self amounted to an Attornment.

2 Cro. 87. Adjudged, that an Attornment to Part is good for the Whole, for it shall be taken most strongly against him; and he having only a Power to assent, he cannot divide or apportion the Thing granted.

A V E R M E N T. *See Superstitious Use 3.*

Matthews *versus* Carey. Mich. 1 Will. III. B. R.

1 Salk. 108.
3 Mod. 137.
In Trespals
the Defendant
justified
under a Presentment
in a Leet, and
good.

(1.) **I**N Trespals for taking a Distress, the Defendant justified, under a Presentment in the Leet, for an Offence, &c. and did not aver in his Plea, that the Offence was committed; and upon a Demurrer it was adjudged, that he need not make such an Averment, because as to him 'tis not material, whether the Offence was actually committed, or not, 'tis sufficient that the Jury had presented it; and as to this Matter, the Court distinguished between a Replevin and a Trespass, for in the first Case the Bailiff is an Actor and must recover upon the Merits of the Cause, but in Trespass he is only to excuse the Wrong alleged against him, but the Plea was adjudged ill upon another Point, which see in 1 Salk. 108.

Negative
Pleas need
not be averred.

(2.) Adjudged, that negative Pleas ought not to be averred, because a Negative cannot be proved; but affirmative Pleas must be averred, with *hoc paratus est verificare*.

(3) In Debt upon a Bond for Performance of Covenants; the Defendant pleaded Performance; the Plaintiff replied, that he was bound to give him (the Plaintiff) an Account of all Money received, &c. and shews, that 10 l. came to his (the Defendant's) hands, and that he had not accounted for it; the Defendant, in his Rejoinder, confessed the Receipt of the Money, but pleads, that he laid it up in his Master's House, and that it was stolen, Et hoc paratus est verificare; adjudged, that this Averment was proper, and that he ought not to have concluded to the Country, because, having alledged new Matter, he ought to give the Plaintiff Liberty to come in and answer it.

Where *hoc paratus est verificare* is good.

But now the Want of *paratus est verificare*, or prout patet per Recordum is aided by the Statute 16 Car. 2.

Mason *versus* March. Trin. 11 Will. III.

(4) In false Imprisonment, laid to be in the Vacation, the Defendant pleaded a Writ issued Teste in Term-time, per quod he took the Plaintiff; he may reply, that tho' it was Teste in Term, yet he took him in Vacation; for per Holt Ch. Just. where the Teste of a Writ is in Support of Justice no Averment shall be admitted against it, otherwise where 'tis to justify a Wrong done.

Where a Teste of a Writ is in Support of Justice, an Averment shall not be against it.

A V O W R Y.

(1.) NOT only he who brings the Replevin, but the Avowant also is an Avow; for the one sues for Damages in Taking the Cattle, and the other sues for a Return habend', or a Restitution of the Goods taken; and therefore the Avowant (i.e.) The Defendant must conclude his Avowry as Declarations are concluded, and not with an *hoc paratus est verificare*, for he is an Avow, and his Avowry is his Declaration, and the Return of the Goods is his Recovery.

Plowd. 392.

(2.) In an Avowry for Damage-feasant, the Defendant entitled himself under a Lease of the Husband, and for not shewing it was by Deed, for that it could not be the Lease of the Wife, but of the Husband only; and this being made an Objection, it was dis-

Sav. 111.

dis.

disallowed, because the Plea was by Way of Bar, and a Bar is good to a common Intent.

(3.) In Replevin, the Defendant made Conusance, for that the Goods taken were the Goods of W. R. and not the Goods of the Plaintiff; and upon a Demurrer to this Abowry, the Abowant had Judgment, for tho' he did not pray a Return in his Abowry, yet he shall have Judgment for a Return, because it appears by the Declaration, that the Defendant took the Goods, and so had the Possession of them, till by the Replevin they were delivered to the Plaintiff, and therefore they shall be returned to the Defendant, that he may be in statu quo prius, &c.

(4.) In Replevin, the Defendant abowed for Damage-feasant, and had a Verdict; adjudged, that he shall have a Retorn habend' for the Cattle, and a Ca. Sa. for the Damages; but if the Party tender the Costs and Damages, the Sheriff after such Tender ought not to execute the Retorn habend'.

3 Cro. 162.

But if for Want of such Tender the Sheriff doth execute the Retorn habend', and afterwards the Costs and Damages are paid, a Writ si constare poterit, &c. lies upon suggesting, that the Costs, &c. are paid, and this is to deliver the Distress, and this is called a Writ of Restitution.

Parker *versus* Meller. Pasch. 2 Annæ.

(5.) **I**N Replevin, if the Defendant had the Possession, 'tis a good Bar against the Plaintiff if he has no Title, but he cannot give a Return, unless he shew a Property in the Goods; and 'tis sufficient if they were delivered to him, for otherwise the Judgment must be quod quærens nil capiat per Billam, but no Return.

AUTHORITY. See Deputy.
A Lease at Will 3.

B A I L.

B A I L.

Wyatt *versus* Evans. Hill. 5 Will. III. B. R.

- (1.) **D**EBT for 99 s. upon a Plaint levied in an Inferior Court and Bail put in ; afterwards the Cause was removed by Habeas Corpus into B. R. and there the Plaintiff declared as in Debt upon a Bond for 6 l. The Question was, whether the Bail put in here, upon the Habeas Corpus, should be liable ? and adjudged, that they should not, for it was another Cause of Action than that to which they were Bail.

Where Bail, put in upon the Removal of a Cause by Habeas Corpus, is not liable.

Anonymus. Pasch. 4 Annæ B. R.

- (2.) **D**EBT was brought in C. B. and a Recognizance taken, and an Action of Debt was brought on that Recognizance in B. R. The Court was moved, that there might be no Special Bail given, for that this was only a Device to better the Security. Sed per Holt, Ch. Just. and Powell, Upon a Recognizance of Bail in C. B. no Capias lies, because 'tis for a Sum certain ; but upon the like Recognizance in B. R. a Capias lies, because 'tis Body for Body, and there may be a Reason to help them to a Capias upon the Recognizance ; and per Holt, in Debt upon a Judgment pending a Writ of Error, the Court will discharge the Defendant upon Common Bail ; but per Powell Just. 'twas antiently otherwise.

Debt in B.R. on a Recognizance of Bail in C. B.

Butler *versus* Rolls.

- (3.) **T**HE Defendant was sued on a Bail-Bond ; to which Action he pleaded and had Notice of Trial, and then he moved to stay Proceedings on the Bond, upon bringing the Principal, Interest and Costs into Court, which was granted, so as he bring it in such Time, that the Plaintiff might not be delayed of the Trial, otherwise to proceed.

Mod. Cases 25.

Where Proceedings were staid upon the Bail bringing in the Principal Money, and Interest, and Costs into Court.

(4.) It

Mod. Cases,
229.
Proceedings
on the Bail-
Bond must
stay, if there
is not Return
of a *Cepi Cor-
pus*.

(4.) It was ruled per Holt, Ch. Just. That the antient Course was, that a Bail-Bond could not be put to Suit till a Rule was had to amerce the Sheriff, for not having the Body at the Return of the Writ; and the Course now is to stay Proceedings on the Bail-Bond, if there is no Return of a *Cepi Corpus*.

Craggett versus Glover.

Mod. Cases
301.
Where a
Prisoner dis-
charged and
retaken must
find Special
Bail.

(5.) **A**fter a Prisoner for Debt under a 100l. was discharged by the Justices pursuant to the Act of Poor Prisoners, he was taken again for above 100l. at the Suit of one Man, and it was ruled, that he must find Special Bail.

Gibbons versus Dove.

Mod. Cases
230.
Bail on a
Writ of Er-
ror, the o-
ther Side
hath twenty
Days Time
to except a-
gainst them.

(6.) **B**A I L was put in upon bringing a Writ of Error; the Course is, that the other Side shall have twenty Days to except against them, which Exception must be entered in the Book of the Clerk of the Errors, and then he who excepts, must take out a Rule to put in better Bail, and serve the Attorney on the other Side with it; but such Rule needs not be served within twenty Days.

Barney's Case.

5 Mod. 323.
A Woman
bailed that
was in-
dicted for
Petit Treason.

(7.) **A**feme Covert was indicted for Petty Treason, in murdering her Husband; and the Grand Jury having found the Bill, she was brought to the Bar, and moved by her Counsel, to be bailed; and there being some Affidavits read of the Fact, by which it appeared to the Court, that the Prosecution was malicious, and there having been no Proceedings for some Time, either upon the Indictment or the Coroner's Inquest, the Court thought fit to Bail her.

2 Cro. 738.
2 Bulst. 182.
Moor 850.
Ca. Sa. a-
gainst the
Principal,
and *Non est
inventus* re-
turned, yet
the Court
will receive
a Render in
Favour of
the Bail.

(8.) Adjudged, That tho' *Non est inventus* is returned upon a Ca. Sa. against the Principal, yet the Court will receive a Render; so they will upon the Return of the first Sci. fa. against the Bail, and so they will upon the Return of the second Sci. fa. so as it be done on the Day of the Return, either sitting the Court, or afterwards at a Judges Chamber; but tho' the Court doth receive such Renders in Favour of the Bail, yet 'tis *de merâ gratia*, and not *de jure*, and therefore the Bail cannot plead such Render to a Sci. fa. brought against them.

But

(9.) But in a Scire facias against the Bail, they may plead the Death of the Principal before the Return of the Capias; for they had Time till then to render him, but not afterwards, for by the Return of Non est inventus, the Recognisance is forfeited.

Where the Bail may plead the Death of the Principal.

King *versus* Sharp. Hill. 7 Will. III. B. R.

(10.) Scire facias against the Bail, who plead, that the Principal died before the Return of the Capias, &c. and upon a special Demurrer, this Plea was adjudged ill; for it should be, that he died before the Return of any Capias, that it may appear he was not alive at the Return of the first Capias, for if he was, the Recognisance is forfeited.

5 Mod. 167
Bail pleaded, that the Principal died before the Return of the Capias against the Principal, not good.
Jones 29.

(11.) Now the Reason why the Death of the Principal before any Capias sued out, is a good Plea, is, because the Principal had Election either to pay the Money, or to render his Body to Prison, and the last is become impossible by the Act of God.

(12.) But the Bail in a Writ of Error cannot render the Principal in Discharge of themselves, because they are bound, that he shall prosecute his Writ of Error with Effect, or pay the Money, if Judgment be affirmed.

Grosvenor *versus* Soame. Hill. 2 Will. III.

(13.) If the Sheriff take insufficient Bail, no Action lies against him; but if he hath not the Defendant forth coming to appear and answer the Plaintiff, he may be amerced, but not after the Plaintiff hath accepted an Assignment of the Bail-Bond.

Mod. Cases, 122.
No Action lies against the Sheriff for taking insufficient Bail.

Page *versus* Price.

(14.) Where an Executor is sued in the Detinet, as he must upon the Contracts of his Testator, he shall not put in Special Bail; but he must, if he is sued on his own Bond or Contract.

Where an Executor shall put in Special Bail, where not

(15.) Nota, All Crimes were bailable at Common Law, for Carcer est mala mansio, that Place being Surety for none but such who could find no other, and they were bailable by the

Sheriff or Bailiffs of Franchises, and sometimes by Writs; as that De odio & atia, Homine Replegiando or the Writ De Manucaptione, and sometimes Ex officio, and in all Cases by B. R. upon an Habeas Corpus; but Homicide was by Statute excepted out of the Power of the Sheriff, so that he could not Bail in that Case, without the Writ De odio & atia, and that was founded upon an Inquisition, by which it was found, that the Party was indicted out of Malice.

(16.) But in Cases of Murder, Manslaughter, Felony, &c. the Party is not bailable per Statute Westm. 1. cap. 15. especially where there is any Presumption of Guilt (i. e.) he is not Bailable by the Justices of Peace, for they are within this Statute; but they are bailable in B. R. at Discretion, for the Statute doth not extend to that Court.

Anonymus. Trin. 11 Will. III. B. R.

Murder not
bailable.

(17.) **A** Person was committed for Murder, and he moved to be bailed. Two Judges were of Opinion that he might, because the Evidence did not prove him guilty; but Holt, Ch. Just. and Gould, Just. were against it, for that the Evidence did affect him, and to allow him this Favour would discourage Prosecutions; and they would not give any Opinion of the Evidence, for as it might prejudice the Prisoner on the one Side, so it might the Prosecutor on the other Side.

Anonymus. Pasch. 7 Will. III.

One in Execution for
Usury, not
bailable.

(18.) **P**ER Holt, Ch. Just. one in Execution upon a Judgment for Usury, brought a Writ of Error in B. R. and moved to be bailed, but it was denied, tho' there was an apparent Error in the Record, and tho' it was formerly the Practice to bail in such Case; for per Curiam, we ought not to Enlarge a Prisoner in Execution; but 'tis otherwise upon an Audita Querela.

BANK-

BANKRUPT.

Feltham *versus* Cudworth. Pasch. 12 Will. III. B. R.
Rot. 97.

(1.) **S**Cire facias on a Judgment, the Defendant pleaded a Composition for 2s. in the Pound: Ita quod it be paid within five Years after the major Part of his Creditors in Number and Value shall subscribe the said Composition; and after the Defendant should be discharged from Imprisonment; and upon a Demurrer to this Plea, Holt Ch. Just. was of Opinion, that a Composition by Vertue of the Statute must be final, and such as will bind the Defendant, and from which he cannot vary, that those Words ita quod, in Things executory (as in this Case) make a Condition precedent; but in Estates executed, they make a Condition subsequent, and so is Littleton to be understood, that the Payment of 2s. per Pound, being a Condition precedent to this Agreement, and wholly in the Power and Will of the Defendant till 'tis paid; 'tis therefore no compleat Agreement, and consequently not within the Statute; and this Case is the stronger against the Defendant, because it doth not appear by his Plea, that he was in Prison, so that this Condition precedent may be impossible to be performed, and consequently the Agreement can never arise; 'tis true, it might have been otherwise if the 2s. in the Pound had been agreed to be paid within the five Years, in the Nature of a Defeasance to the Agreement, for this Statute operates as a Defeasance.

Farr. 10.
Composition
made by
Vertue of the
Statute a-
gainst Bank-
rupts, must
be final.

Hussey *versus* Fidell. Hill. 11 Will. III. B. R.

(2.) **A**Djudged, that a Sale of Goods by a Bankrupt, after an Act of Bankruptcy, is not meerly void; the Contract is good between the Parties, but it may be avoided or not avoided by the Commissioners and Assignees at Pleasure; therefore they may either bring Trever for the Goods, as supposing

Sale of Goods
by a Bank-
rupt after an
Act of Bank-
ruptcy, void.

the Contract to be void, or may bring Debt or Assumpsit for the Value, which affirms the Contract.

Ellis versus Ollave. Trin. 11 Will. III. B. R.

Composition
made with
the Parties
signing, binds
the rest.

(3.) **I**N a Case between the said Parties, an Objection was made to the Composition, for that the Agreement appeared to be only to, for, and with these Creditors who were Parties, and had signed the Composition; but this Objection was disallowed, because the Statute makes this an Agreement for the rest.

Dyson versus Glover. Trin. 11 Will. III.

The Act re-
cited as Non-
sense.

(4.) **T**HE Defendant setting forth and reciting the Statute in his Plea, alledged it thus, (viz.) Quod liceret vad' & pro duobus, &c. realium creditorum facere agreementum, &c. cum aliquibus creditorum suorum; & per Curiam, this being a private Act and set forth as Nonsense; and the Defendant having not brought himself within it, 'tis ill; for he hath compounded as a Debtor, and not as a Creditor: So the Plaintiff had Judgment.

Cro. Car. 568.
Jones 451.
Copyhold
Estate bound
by the Sale of
the Commis-
sioners.

(5.) The Custom of a Manor was, that where a Copyholder died seised in Fee, his Wife should have the third Part of his Lands for her Dower for Life, and thirteen Years after, which Custom was confirmed by Act of Parliament, afterwards the Husband Copyholder became a Bankrupt, and the Commissioners sold his Estate to his Creditors; then the Husband died, and after his Death the Vendees were admitted, and the Wife claimed Dower, alledging, that her Husband died seised; and the rather, because the Vendees were not admitted till after his Death: Sed per Curiam, the Estate of the Husband was bound by the Sale of the Commissioners, and the Bargainee was vested of the Estate, tho' he could not enter to take the Profits, till Admittance and Composition with the Lord for a Fine; but if it should be otherwise, yet when once the Bargainee was admitted by the Lord, such Admittance shall have Relation, and divest the whole Estate ab initio.

2 Cro. 25.
Sale of Goods
by a Bank-
rupt, but be-
fore any
Commission
taken out,
void.

(6.) A Man became a Bankrupt 12 Feb. and afterwards, but before any Commission taken out, he made over his Goods to W. R. who was one of his Creditors, in Satisfaction of his Debt; afterwards the Commissioners sold these Goods to other Creditors, who brought an Action of Trover against W. R. & per Curiam

Curiam, the Sale made to him by the Bankrupt is void by the Statute, for it would be absurd, that he should be credited to dispose and distribute his Goods, who is discredited by his Bankruptcy.

Anonymus. Pasch. 7 Will. III.

- (7.) **T**WO joint Traders, one of them became a Bankrupt: The Interest of a joint Trader is not bound by the Bankruptcy of his Companion.
 Per Holt Ch. Just. the Commissioners cannot meddle with the Interest of the other, for 'tis not affected by the Bankruptcy of his Companion.

BARGAIN and SALE.

(1.) **E**MPTIO & VENDITIO is an Agreement for the Seller to part with a Thing for Money given to him by the Buyer, for if it be of one Thing for another in Specie, 'tis not a Bargain and Sale, but an Exchange, which was the original Way of Buying before Money was invented.

(2.) In emptione & venditione, we are to consider not only what is the express Agreement of the Parties, but likewise what is implied jure naturali & positivo.

(3.) And first 'tis implied, that the Seller shall deliver the Thing sold, and that he shall keep it safe till 'tis delivered, which he is bound to do with the same Care as if it was a Thing lent to him, for the Seller had, or is presumed to have, a Benefit by the Sale; but this Care of keeping is only for a reasonable Time, for after a faulty Neglect of the Buyer, if the Thing is lost, the Seller is not liable, unless it was lost dolo malo.

(4.) Where no Place, or Time of Delivery, or Payment is appointed, 'tis always implied, that the Delivery be made immediately, and Payment upon the Delivery, unless 'tis inconsistent with the Nature of the Thing to be delivered.

(5.) Now by a bare Agreement the Bargain may be so far perfected, without any Delivery or Payment of Money, that the
 Par-

Parties may have an Action on the Case for Non-performance of the Agreement, but no Property vests till there is a Delivery; and therefore if a second Buyer gets a Delivery, he has the better Title.

Bargain and Sale, without any Consideration, not good without an Attornment.

(6.) As to Bargain and Sale upon the Statute, it has been held, that if a Man plead a Bargain and Sale of a Rent, and set forth no Consideration, in such Case he must shew an Attornment, for then it enures as a Grant at Common Law, which cannot be without an Attornment; but if a Consideration is expressed, 'tis otherwise, because then 'tis a Conveyance by the Statute, to which an Attornment is not necessary, but then he must plead it to be enrolled, and in what Court, that the Defendant may be able to find it.

3 Cro. 166.
Yel. 213.

(7.) And as to that Matter, to plead a Bargain and Sale of a Reversion by Deed debito modo irrotulat' in Cancellaria, is not good after a Verdict; for non constat, whether it be an Enrolment at Common Law, or by the Statute.

(8.) But if 'tis said per Indenturam secundum formam Statuti debito modo irrotulat' in Cancellaria, 'tis good, for debito modo implies all, (viz.) a Consideration, and within six Months.

B A R O N and F E M E.

See Executor 2.

Maddox *versus* Winne. Pasch. 12 Will. III. B. R.

Where they are but as one Person in Law.

(1.) **H**usband and Wife were sued, and afterwards in the Pleadings it was said Venerunt partes predict' per Attornatos suos predict', this was held naught upon a Writ of Error, because they are but one Person in Law.

Woodier *versus* Gresham. Mich. 9 Will. III.

(2.) **S**cire facias was brought by Husband and Wife, upon a Judgment obtained by the Wife *dum sola*, upon which Scire facias there was an Award of Execution, and then the Wife died, and the Husband brought a new Sci. fa. &c. and afterwards, upon a Writ of Error brought, the Question was, Whether what was recovered upon this Judgment should go to the Husband, or to the Administrator of the Wife? It was insisted for the Administrator, that the Award of Execution upon the first Scire facias, did not vest any Right in the Husband, because the Execution must still be on the Judgment obtained by the Wife. But per Holt, Ch. Just. this Case doth not differ from the Case of * Obrian and Ram, which was Judgment against a Feme Sole, who afterwards married, and upon a Scire facias brought against Husband and Wife, Execution was awarded against both; then the Wife died, and a Sci. fa. was brought against the Husband alone, and he was adjudged to be chargeable, which proves, that the Award of Execution upon the first Scire facias, made a plain Alteration of the Case, for if that had not been done, the Husband would not have been liable upon the Judgment had against his Wife; so here, in the Principal Case, by the Award of Execution upon the first Scire facias, a Right is attached in the Husband, which shall survive to him after the Death of his Wife, and that he might charge another in the same Manner as he might be charged himself.

1 Salk. 116.
Scire facias
by Husband
and Wife on
a Judgment
she had *dum*
sola, and an
Award of
Execution,
and then the
Wife died,
a Right is
attached in
the Husband.

* Mich. 3
Jac. 2. B. R.
Rot. 192.
3 Mod. 185.

Buckly & Ux' *versus* Collier. Mich 4 Will. III.
B. R.

(3.) **H**usband and Wife brought an Action on the Case, in which they declared, that the Defendant being indebted to them for Periwig Work done by the Wife, at the Instance and Request of the Defendant; he promised to pay, &c. and upon a Demurrer to this Declaration, it was adjudged ill, because the Duty belongs to the Husband, and shall survive to his Executors if he die; therefore he ought not to be joined in this Action with the Husband, unless an express Promise had been made to her to pay the Money.

Where the
Wife ought
not to be
joined in the
Action, un-
less an ex-
press Pro-
mise was
made to her.

* 2 Cro. 77,
205.

Machell & Ux' *versus* Garrett. Mich. 11 Will. III.
B. R.

Where Nun-
quam in le-
gitimo modo
copulati, is no
good Plea.

(4.) **C**ASE, &c. by Husband and Wife, for a Cause a-
rising to the Wife before Marriage, &c. The Defen-
dant pleaded, that the Plaintiffs Nunquam fuerunt legitimo
matrimonio copulati. The Plaintiffs replied, that they were mar-
ried at such a Time and Place, and upon a Demurrer to this
Replication, the Plaintiffs had Judgment; for per Curiam, in
personal Actions (as this was) it was Right to lay the Matter
upon the Fact of the Marriage, to make it issuable and triable
by a Jury, and not upon the Right of the Marriage, as the De-
fendant had done in his Plea, and as it ought to be done in
Appeals and real Actions.

Hutton *versus* Mansell. Pasch. 3 Anna.

3 Lev. 65. (5.) **C**ASE by Feme Sole, in which she declared, quod cum
she agreed and promised to marry the Defendant, he in
Consideratione inde, promised to marry her, and at the Trial
the Promise of the Man was proved. Et per Holt, Ch. Just.
there is no Necessity of proving an actual Promise on the Wo-
man's Part; for 'tis sufficient Evidence to shew, that she
countenanced the Promise, and carried her self so as one, who
approved and consented to it.

Hob. 3.
Roll. 344.
Where Hus-
band and
Wife Mort-
gage her
Lands, and
she die, the
Husband
shall re-
deem.

(6.) Adjudged, That where Baron and Feme mortgage the
Lands of the Wife, and she dies, the Equity of Redemption
shall survive to the Husband, and not to the Administrator of
the Wife; but if he die, the Wife shall have the Benefit of Re-
demption, and not the Executor of the Husband.

Powell *versus* Maine.

3 Lev. 403.
Where he a-
lone may
bring the
Action.

(7.) **T**M. entred into a Bond to a Feme Sole, conditioned
to pay so much Money on a Day certain, and af-
terwards she married the Plaintiff, who brought an Action of
Debt on this Bond. The Defendant demanded Oyer of the
Bond and Condition, which was to pay so much Money to the
Wife, and then he demurred to the Declaration. Sed per Cu-
riam, Judgment was given for the Plaintiff.

Withers versus Kelsey.

- (8.) **A** Woman had a Portion devised to her, and the Payment thereof was charged on certain Lands, afterwards upon her Marriage with T. S. he settled a Jointure on her, and died, before he received the Portion, having made a Will and appointed an Executor. Adjudged, That the Executor shall have this Money, because 'tis not in Nature of a Chose in Action, but in Nature of a Rent, for 'tis charged on Lands, and 'tis given the Husband by the Intermarriage; and for that Reason it shall go to his Executor, and not to his Wife surviving him.
- 1 Ch. Rep. 189. Lands were charged to pay a Woman's Portion, she married and the Husband died before he received it, the Executor of the Husband shall have it.

Thompson versus Woods.

- (9.) **D**EBT upon Bond conditioned to leave his Wife 80 l. at his Death in Case she should survive, so that she might receive and take it to her own Use; the Husband died, and in an Action of Debt brought against his Administrator, he pleaded, that the Husband made a Will, and his Wife Executrix, and left Goods to the Value of 100 l. and upwards, and devised, that she pay her self the said 80 l. and upon a Demurrer to this Plea, it was adjudged ill; because the Husband at his Death might owe Money on Judgments and Statutes, and so she might not be able to pay her self, and his Estate might be so incumbered, that it would be better for her to renounce the Executorship.
- 3 Lev. 218. Plea to a Debt on a Bond to leave his Wife so much, not good.

Rands versus Tripp.

- (10.) **T**HE Plaintiff being a Tradesman in London, and having married the Defendant's Daughter, with whom he had 400 l. Portion; the Defendant spoke merrily in Company, that as soon as his Son in Law should be Knighted, so that his Daughter might be a Lady, he would give her 2000 l. Afterwards the Plaintiff, without acquainting the Defendant with it, procured himself to be Knighted, and then brought an Action upon this Promise, and the Jury gave 1500 l. Damages, which the Chief Justice thought a very hard Verdict, because the Words were spoken merrily, intending only to pay the Money, when the Plaintiff by his Trade (which was a Tobacconist) should get an Estate to qualify him for Knighthood, and therefore a new Trial was granted.
- Promise to pay the Husband so much when his Wife should be a Lady, good.

B A S T A R D.

Masters *versus* Child. Hill. 10 Will. III. B. R.

Bastard is settled in the Place where born, unless by Fraud she was delivered there.

(1.) **R**uled, that the Birth of a Bastard Child prima facie settles it in the Place where it was born; but if a Woman big with Child of a Bastard, and settled in one Parish, is perswaded to go into another, and there to be delivered, this Fraud will make the Parish chargeable where the Mother was settled, tho' the Child was not born there: But if a Woman with Child of a Bastard come accidentally into one Parish, and is perswaded by some of the Parishioners to go into another Parish, which she doth, and there is delivered, this shall not charge that Parish which perswaded her.

The Queen *versus* Chafin. Pasch. 1 Annæ B. R.

Order, that the reputed Father should give Security to perform the Order, quashed.

(2.) **A**n Order of Sessions was made upon an Appeal, for maintaining a Bastard-Child, which Order was quashed; and thereupon it was moved, that the reputed Father might be bound in B. R. to appear below; and per Curiam, if the Original Order made by the Justices is below, we will oblige him to go down again, but if it is here, we cannot; and it appearing, that the Original Order was in B. R. and by Consequence, that the Justices could have no Authority below, the Court was moved, that the reputed Father might give Security to perform; but that was opposed, because the Course is to pray, that the Order might be confirmed, and then there is Occasion for giving Security, because, if the Order thus confirmed is not obeyed, the other Side may have the Process of this Court against the reputed Father, or he may be bound to appear at the Sessions; afterwards this Order was quashed as to Part, and confirmed as to the Residue; the Part for which it was quashed was, that the reputed Father should give Security to perform the Order, which, per Curiam, is naught.

(3.) A Bastard is *Terminus a quo*, he is the first of his Family, for he hath no Relation of which the Law takes any Notice, but this must be understood as to civil Purposes, for there is a

Relation as to moral Purposes, therefore he cannot marry his own Mother or Bastard Sister.

BILL of EXCEPTIONS.

See Evidence 10.

BILLS of EXCHANGE.

See Executor 10. Infant 12.

Nicholson *versus* Seldnith. Pasch. 9 Will. III. C. B.

(1.) **R**uled, that where a Bill is drawn payable to W. R. or Bearer, an Assignee must sue in the Name of him to whom it was made payable, and not in his own Name; for if the Bearer was allowed to sue in his own Name, then a Stranger, who by Accident may find the Note, if lost, might recover: But if 'tis made payable to W. R. or Order, there an Assignee may sue in his own Name, because the Order must be made by Indorsement, or the like, to shew the Drawer's Consent.

Difference between a Bill payable to W. R. or Bearer, and to him or Order.

Jordan *versus* Barloe. Pasch. 12 Will. III. B. R.

(2.) **R**uled, that where a Bill is drawn payable to W. R. or Order, 'tis within the Custom of Merchants, and such a Bill may be negotiated and assigned by Custom, and the Contract of the Parties, and an Action may be grounded on it, tho'

Bill payable to W. R. or Order, is within the Custom of Merchants.

* *Postea* 5. 'tis no Specialty; but if 'tis made payable to W. R. or * Bearer, 'tis not within the Custom of Merchants, and therefore, when, upon such a Bill, the Plaintiff declared, that the Defendant being a Merchant, had drawn a Bill according to the Custom of Merchants, but had not paid the Money; this Declaration was held ill; and all this was resolved in * Hodges and Steward's Case.

* 1 Salk. 125.
* *Postea* 5.

Williams *versus* Feild. 5 Will. III. B. R.

Where the last Endorsee may bring an Action against any of the Endorsers.

(3.) **R**uled, that where a Bill is drawn payable to W. R. or Order, and he endorses it to B. who endorses it to C. and he endorses it to D. the last Indorsee may bring an Action against any of the Endorsers, because every Indorsement is a new Bill, and implies a Warranty by the Indorser, that the Money shall be paid.

Clerke *versus* Mundall. 3 Will. III. apud Guildhall coram Holt Ch. Just.

Where a Bill endorsed and not paid will not extinguish a precedent Debt.

(4.) **W**. R. having a Bill of Exchange, and being indebted to T. P. indorses the Bill to him; afterwards he brought an Assumpsit against W. R. and upon Non Assumpsit pleaded, at the Trial he gave Evidence this Bill of Exchange indorsed to the Plaintiff, and that it had been so long in his Hands after it became due and payable, and therefore he accounted it as Money paid: But per Holt Ch. Just. a Bill, without Payment of the Money, shall never go in Satisfaction of a precedent Debt or Contract; if 'tis not Part of the Contract, that it should be in Satisfaction, as if A. sells Goods to B. and 'tis agreed between them, that A. shall have a Bill of Exchange in Satisfaction for the Goods, in such Case B. is discharged, tho' the Money should never be paid, because the Bill it self was Payment; but otherwise a Bill shall never extinguish a precedent Contract or Debt; 'tis true, if Part of a Bill of Exchange is paid, it shall only be a Discharge of so much of the old Debt.

1 Salk. 125.
The Plaintiff declared on a Custom for the Bearer, to bring an Action, if the Defendant demurs and doth not traverse the Custom, Judgment shall be against him.

Hodges *versus* Steward. Pasch. 5 Will. III. B. R.

(5.) **T**HIS Case is reported in 1 Salk. to which may be added, that this was an Action on the Case brought upon an Inland Bill of Exchange, in which the Plaintiff declared upon a special Custom in London for the Bearer, to bring the Action, &c. and upon a Demurrer to the Declaration, besides the other Points adjudged in this Case it was held, that the Defen-

dant

dant having demurred, without traversing the Custom, he had thereby confessed there was such a Custom, tho' in Truth there was not, and for that Reason the Plaintiff had Judgment; for tho' the Court takes Notice of the Law of Merchants, as Part of the Law of England, yet they cannot take Notice of the Customs of particular Places; and this Custom, as set forth in the Declaration, being sufficient to maintain the Action, and the Defendant confessing it by his Demurrer, he hath given Judgment against himself.

Brough *versus* Parkins. Mich. 2 Annæ, B. R.

(6.) **CASE** upon an Inland Bill of Exchange brought in the C. B. against the Drawer, and Judgment for the Plaintiff by Nil dicit; and now upon a Writ of Error in B. R. it was argued for the Plaintiff in Error, that the Declaration was ill, because it did not appear therein that the Bill was protested; and since the late * Statute, no Action can be brought against the Drawer, unless a Protest is made as directed by that Statute, and this ought to be set forth in the Declaration; because at Common Law the Party had no Remedy against the Drawer, except Notice was given to him of Non-payment of the Money by him on whom the Bill was drawn; so that now a Protest is necessary, or 'tis not; if 'tis necessary, it ought to be set forth in the Declaration; if 'tis not necessary, then the Party had the same Remedy before the Statute that he hath now, so that the Statute is of no Effect; on the contrary it was argued for the Plaintiff in the Action, that it doth not appear that the Bill was underwritten; for if it was not, then 'tis not within the Statute, and a Protest cannot be made without it; for in Cases of Inland Bills, a Protest was not necessary at Common Law, as 'tis in Foreign Bills, but admitting a Protest in this Case is required by the Statute, yet it ought not to be set forth in the Declaration, but 'tis to be considered at the Trial; for if the Drawer had any Damage by the not protesting it, and if such Damage amounts to the Value of the Bill, 'tis a total Discharge to him, if less, 'tis a Discharge for so much: Holt Ch. Just. the Plaintiff must give convenient Notice to the Drawer of Non-payment of the Money in Cases of Inland as well as of Foreign Bills of Exchange, for if the Drawer receives any Prejudice by the Plaintiff's Delay, he shall not recover; a Protest on a Foreign Bill is Part of its Constitution, but on Inland Bills it was not necessary before this Statute, at Common Law; and the Statute doth not take away the Plaintiff's Action for Want of a Protest, or make it a Bar to his Action, but only deprives him of that Interest, or those Damages for not making a Protest, as he might have, if

Mod. Cases
So.

Case against
the Drawer
of an Inland
Bill good,
without a
Protest.

* 9 & 10
Will. 3.
cap. 17.

he

he had made one; or to give the Drawer a Remedy against him by Way of Action for Costs and Damages, in not making a Protest, quod Powell Just. concessit, and that since the Statute a Protest was never set forth in the Declaration.

Yeoman versus Bradshaw.

Postea Executor 10.
Bill of Exchange is no Specialty, therefore it shall be *Bona notabilia* where the Debtor is, and not where the Bill is.

(7.) **P**ER Holt Ch. Just. a Bill of Exchange shall be *Bona notabilia* where the Debtor is, and not where the Bill is, for 'tis in Law no Specialty; for if an Executor pays Debts upon simple Contracts, or suffers Judgment to pass against him upon Actions on such Contracts, yet he may plead such Payment or Judgment in Bar to an Action on a Bill of Exchange, and such Bill is like an Award in Writing, which is no Chattel where the Award it self lies, and in Pleading such Award or a Bill of Exchange, 'tis never said *hic in Curia prolat'*, which shews they are no Specialties, and so it was adjudged; tho' it was objected, that the Paper on which it was written was Evidence that it was a Debt, and that Trover and Conversion would lie for it, and consequently it must be Goods and Chattels, and therefore ought to be considered as *Bona notabilia*, where the Bill or Award was.

Anonymus. Pasch. 2 Annæ, B. R.

Action against the Acceptor, where brought for Part of the Money, not good.

(8.) **A** Bill of Exchange was drawn on W. R. for 40 l. payable to O. W. or Order, W. R. accepts the Bill, and afterwards O. W. the Drawer endorses Part of it to the Plaintiff, who brought an Action against the Acceptor; adjudged, that it would not lie, because, by his accepting the Bill, he made himself liable only to one Action for the Whole, and not to several Actions for Part of the Money.

Anonymus. Mich. 10 Will. III.

Action doth not lie against the Indorser, without setting forth an Attempt to find out the first Drawer, or a Demand of the Money of him.

(9.) **A** Bill of Exchange being made payable to W. R. or Order, W. R. endorses it, B. the endorsee cannot sue W. R. unless he attempt to find out the first Drawer, or to demand it of him, for the Indorser is but a Warrantee that the Drawer should pay, and therefore liable only upon his Default: Per Holt Ch. Just. at Guildhall, and such Attempt must be set forth in the Declaration.

Anonymus. Mich. 10 Will. III. at Guildhall.

- (10.) **A** Bank Bill, payable to W. R. or Bearer, was given to W. W. who lost it, and it was found by a Stranger, who assigned it to C. upon a Valuable Consideration; afterwards C. got a new Bill in his own Name. Et per Holt, Ch. Just. W. R. may have Trover against the Finder, for he had no Title, tho' a Payment to him had indemnified the Bank; but not against C. because of the Consideration, which, by Course of Trade, creates a Property in the Assignee or Bearer.

Bill payable to Bearer lost, and found by a Stranger, who assigned it to C. good, but Trover lies against the Finder.

B I S H O P.

- (1.) **A** L L Bishopricks in England were antiently Donative by the King; and there was good Reason for it, for he endowed them with Lands and Revenues, and Baronies, and therefore it was reasonable he should be the Patron. The Ceremony then in Use, was Investiture per Annulum & Baculum; the one was a Symbolical Representation of the Bishops Spiritual Marriage with the Church, the other of his Pastoral Care and Charge over the flock of Christ.

- (2.) But after many Contests between the Kings of England, and the Popes, it was * agreed, in the Reign of King John, That the King should permit a free Election by the Chapter, but founded on his Conge de eslire (i. e.) a Licence to give them Leave to choose a Bishop upon any Vacancy, and that the new elected Bishop should not have his Temporalities, till he swore Allegiance to the King; but that Confirmation and Consecration should be in the Power of the Pope, by which Means he gained, in Effect, the Disposol of the Bishopricks in England.

* The Original Charrer of this Agreement is in *Mat. Paris* and in *Eadmerus*.

- (3.) And thus it continued till the * 25th Year of the Reign of H. 8. in which Year the Papal Jurisdiction was taken away by Statute Quod Vid.

25 H. 8. cap.

- (4.) Afterwards, by the Statute 1 Ed. 6. All Bishopricks were made Donative, as formerly they were; but by a Statute made 8 Eliz.

1 Ed. 6. cap. 1.

Jones 160.
Litch 37.

8 Eliz. the Statute 25 H. 8. was reſtoꝛed, and Biſhopricks in England were again made Elective by the Conge d'eſlire; but in Ireland they are Donative by Letters Patents at this Day.

(5.) The Manner of making a Biſhop, as well in Caſe of Tranſlation as new Creation, is thus;

When the See is Vacant, the Dean and Chapter certify it to the King in Chancery, and pray the King's Licence to elect a Biſhop; thereupon the King grants his Conge d'eſlire ſuch a Perſon, naming him, and ſo they proceed to an Election; and when that is done, they certify it to the King, to the Archbiſhop, and to the Party elected, and then the King by his Letters Patents gives the Royal Aſſent, and Commands the Archbiſhop to confirm and conſecrate him; whereupon the Archbiſhop examines the Election, and the Party, and then confirms the Election, and conſecrates him.

* Jones 160.

(6.) This is the Manner of Proceeding in Creations, and it holds likewise in Caſes of Tranſlations, excepting only, that the Perſon tranſlated is not conſecrated de novo; for a * Conſecration is like an Ordination (i. e.) 'tis an indelible Character, and holds good for ever.

Jones 160.

(7.) Heretofore, when a Biſhop was to be tranſlated, there was no Election to the new See, for the Rule in the Canon Law is, Electus non poteſt eligi; and becauſe it was pretended, that the Biſhop was married to the firſt Church, which Marriage could not be diſſolved but by the Pope, therefore a Petition was made to him, who conſenting to it, then, and not before, the Biſhop was tranſlated to his new See; and this was ſaid to be by Poſtulation, but rather it may be ſaid to be by Uſurpation, for 'tis expreſſly againſt the Statutes 16 R. 2. and 9 H. 4. cap. 8. and Tranſlations are ever by Election, and not by Poſtulation.

Jones 162.

(8.) When a Biſhop is tranſlated, the old See is not void by the Election to the new one, until the Election is confirmed by the Archbiſhop; for tho' he is elected, yet the King may not conſent, or the Archbiſhop may not confirm, and 'tis not reaſonable that the Biſhop ſhould looſe his old Preferment, till he hath gained a new one; and ſo 'tis in Caſe of Creation, he is not compleatly Biſhop till Conſecration.

(9.) For, as there are four Things to compleat a Parſon (viz.) Preſentation, Admiſſion, Inſtitution and Induction, ſo there are four Things analogically requiſite to compleat the Biſhop; the firſt is Election, and this reſembles the Preſentation; the next is Confirmation, which reſembles Admiſſion; the next is Conſecra-
tion,

tion, and this resembles Institution ; and the last is Installation of a Bishop, or Inthronization of an Archbishop, which resembles Induction.

(10) Originally the Archbishop was Bishop over all England, as Austin was, per Coke and Dodderidge. 1 Roll. Rep. 328.

(11.) Bishops did sit and had a Vote in Parliament in the Time of the Saxons, but it was not *ratione Baronie*, but *ex Privilegio personali*, as they were Bishops, for they were not Barons till the Norman Reign ; for in the Reign of the Saxons, they were free from all Services and Payments, excepting only to Castles and Bridges ; but William, called the Conqueror, deprived them of this Exemption, and instead thereof turned their Possessions into Baronies, and made them subject to the *Tenures* and Duty of Knights Service.

Seld. Tit.
Honour 576.

B O N A N O T A B I L I A.

See Executor 10.

B O N D S.

Cromwell *versus* Dresdale. Mich. 8 Will. III.

(1.) **P**ER Holt Ch. Just. If the Delivery of the Bond was after the Date, the Plaintiff must declare generally of a Bond dated on such a Day, but with a *primo deliberat* on such a Day ; for otherwise it shall be intended to be delivered on the Day 'tis dated.

Where the Plaintiff must declare on the Delivery of a Bond after the Date.

Henderfon *versus* Foster. Hill. Will. III. B. R.

Where *sex*
triginta shall
be taken as
one Word.

(2.) **I**N an Action of Debt, the Plaintiff declared on a Bond solvend' triginta & sex libras; and upon Oyer of the Bond it appeared, solvend' sex triginta libras, which is six Times as much as the Plaintiff had declared for (viz.) 180 l. and for this Variance the Defendant demurred to the Declaration, but it was held good; for *sex trigint'* shall be taken as one Word, like a Bond dated *tres viginti dies*, which was taken to be on the 23d Day, &c.

Boughton *versus* Shaw. Pasch. 5 Will. III.

Bond given
to the Plain-
tiff himself
to appear,
&c. is not
within the
Statute.

(3.) **D**E B C upon Bond conditioned, that whereas W. R. was arrested at the Suit of the Plaintiff, if therefore he the said W. R. should appear and put in Bail at the Return of the Writ, or surrender himself to the Serjeant, then the Bond should be void. The Defendant pleaded the Statute of H. 6. and that this Bond delivered to the Serjeant, and taken by him in the Name of the Plaintiff, was for Ease and Favour; and upon a Demurrer to this Plea, per Curiam, a Bond given by the Party arrested, to the Plaintiff himself, or by a Stranger, to the Plaintiff himself, for the Enlargement of the Party arrested, is not within the Statute, but good.

Allen 21, 42.
Sarrnd. 291.
Jones 303.
Sid. 234, 272,
420.

(4.) Three Joint Obligors, an Action was brought again two, they may plead in Abatement, that another sealed the Bond, who is still alive, and not named; so 'tis of a Recognisance before a Mayor or Recorder, but they cannot crave Oyer and Demurrer for Variance, for perhaps all three did not seal, and so the Court will intend; but 'tis otherwise of a Recognisance before a Judge; for in a Scire facias, the Defendant may either plead it in Abatement, or crave Oyer and Demurrer for Variance.

Sid. 238.

(5.) So where there are three Joint Obligors, and one of them dies, the Plaintiff must shew, that one is dead, for otherwise he cannot sue the two Survivors, and the Executor of him who is dead.

Yel. 177.

(6.) Where a Bond is made to A. B. and C. conditioned, that W. R. shall pay 20 l. to W. W. there all of them must join in the Suit, for they are but as one Obligee; and if one of them should die, the two Survivors must join in the Action, tho' they have no Interest in the Money.

(7.) Two seal and deliver a Bond to W. R. and afterwards by Consent of all Parties, a Third is added, and he seals and delivers the Bond: adjudg'd this did not make the Bond void, but that all three are now bound; but it had been otherwise if the third Man had been added without the Consent of the Obliger. 2 Lev. 35.
3 Cro. 626.

(8.) Debt upon a Bond of 50 l. which upon Oyer appeared to be in quanto ginta libris; adjudged ill, because of the Variance and Insensibility of the Word. 2 Lev. 166.

(9.) Three were jointly and severally bound, and an Action of Debt being brought against one of them alone, he craved Oyer of the Bond, and pleaded that the Seal of one of them was torn off; and upon a Demurrer this was adjudged a good Plea, because 'tis not the same Bond as it was at first. 2 Lev. 220.

(10.) Debt upon Bond, in which the Plaintiff declared, that the Defendant was bound to him the Plaintiff W. R. in 50 l. upon Non est factum pleaded, the Jury found the Bond in hæc verba, and that it was made to W. R. and that the Words nuper Vic. Oxon' were since interlined: Et per Curiam, the Interlineation might be material, but it doth not appear to be so, for non constat, whether it was to him, or not, colore Officii, and therefore the Verdict is for the Plaintiff; but if instead of Non est factum, the Defendant had craved Oyer, and demurred, then it had been against the Plaintiff for this Variance. 1 Roll. Rep. 40.

Placket *versus* Gresham. Mich. 9 Will. III.

(11.) **I**N this Case it was held, that where a Sheriff takes a Bond as a Reward for doing a Thing, 'tis void, for it may be to warrant him in the Breach of his Duty, but if 'tis to save him harmless in doing a Thing which 'tis his Duty to do, then 'tis good. Where a Bond taken by a Sheriff is good, where not.

B Y - L A W S.

Hob. 211.

(1.) **I**n all Corporations there is a special Clause, by which they have Power to make By-Laws, but such enabling Clauses are needless, because they are included in the very act of incorporating, as a Power to sue, purchase, or the like; for as the natural Body hath Reason to govern it self, so Bodies incorporate must have Laws, which are in Nature of political Reason to govern themselves.

Hob. 211.
5 Rep. 61.

(2.) The Inhabitants of a Town or Parish may make By-Laws for repairing their Church or Highways, and this without any Custom or Prescription so to do, because these are Necessities to which the Law hath made them Subject as they are a Parish; and therefore the Law enables them to supply these Occasions, as if they were incorporated; but they cannot make a By-Law for regulating a Common, without a Custom enabling them so to do, and such Custom must be pleaded.

1 Vent. 167.

(3.) But a By-Law in a Manor binds all the Tenants of that Manor, because they are supposed to dwell there.

1 Roll. Rep.
5.

(4.) A By-Law that none shall exercise his Trade in such a Till, until first allowed so to do by such or such Persons, is not good, because 'tis in the Power of these Persons to hinder him.

1 Roll. Rep.
312.

(5.) But a By-Law in London not to use a Hot Press, under the Penalty of 5 l. nor to make one under the Penalty of 10 l. is good, because 'tis dangerous in respect of firing, and 'tis a Deceit to the Buyers.

2 Vent. 183.

(6.) A By-Law under such a Penalty, and whosoever shall refuse to pay it, to be committed, is naught, because nullus liber homo imprisonetur nisi per legale iudicium, and no Assent can change this Law; but if the By-Law had been, that the Penalty should be levied by Distress, an Action of Debt would have laid. 5 Rep. 64. Clerk's Case, but not to be levied by Distress and Sale of Goods.

Jones 162.

(7.) The Town of Boston, by their Charter, claimed a Power to make By-Laws or Orders, and to commit for not obeying them;

them; and this in a Quo Warranto was held to be ill, according to Clerk's Case.

8. All By-Laws must be subject to the Laws of the Realm, and subordinate to them; therefore, if they are against the Laws and Statutes, they are void. Hob. 211.
5 Rep. 63.

B R I D G E S.

(1.) **T**hese are to be repaired by the County, unless the *Locus in quo*, &c. is bound to repair it, and that may be by Toll or Tenure, but not by Prescription; but if it lie Part in one County and Part in another, each County is respectively chargeable for so much of the Bridge as lies therein, and that may be by Toll, Tenure, or Prescription, or unless some private Person is bound to repair it, and that may be by Toll or Tenure, but not by Prescription.

(2.) Indictment for not repairing a Bridge was adjudged naught, because non constat in what County it lies, and because it did not set forth what kind of Bridge, (*viz.*) whether Foot, Horse, or Cartbridge, and because it charged the Defendant *ratione Manerii sui*, when it should be *ratione tenuræ Manerii sui*, so that it did not appear that he was Owner of the Manor. Stiles 109.
Spiller's Case.

(3.) Information against the Inhabitants of the County of Nottingham, for not repairing a Bridge over the Trent, two of the Inhabitants, in the Name of themselves and the rest, pleaded, that A. and B. Owners of Whiteacre, ought to repair it *ratione tenuræ*, and traverse, that the Inhabitants of the County have or ought to repair; the Attorney-General replied, that the Inhabitants, &c. ought to repair it, and traversed that A. and B. ought; they rejoin, that A. and B. ought to repair, and thereupon they were at Issue; and at a Trial by a Middlesex Jury, the Defendants were found guilty upon the last Traverse, *quod nota*. 2 Lev. 112.

The Defendant, as Lord of a Manor, used to repair Lodden Bridge, he alien'd the Manor to several, (*viz.*) Part to A. and Part to B. and afterwards B. was indicted for not repairing this Bridge as he ought *ratione tenuræ*, he pleaded, that A. and the other were Purchasers with him of the same Lands held of that Manor: Sed per Curiam, we will compel you to repair this Bridge, Jones. 273.

Bridge, because 'tis a Thing of Necessity, and afterwards you may seek for Contribution amongst the rest, for the repairing shall not stay till you determine who shall be Contributors.

CERTIORARI.

The Queen versus Dixon. Mich. 2 Annæ, B. R.

1 Salk. 180.
Mod. Cases
61.

Certiorari to
remove the
Indictment,
but not the
Conviction.

(1.) **T**here is a short Note of this Case in 1 Salk. which see, the Case was thus:

N. The Defendant was indicted for selling five Yards of Muslin, affirming it to be worth 5 s. per Yard, whereas it was not worth 2 s. 6 d. per Yard; upon Not guilty pleaded, the Defendant was found guilty, and afterwards brought a Certiorari, and moved to quash this Indictment: Sed per Holt Ch. Just. This Certiorari was only to remove the Indictment and not the Conviction; besides, here is no Day in Court for the Defendant, as it ought to be upon the Return of a Certiorari, to remove an Indictment after Conviction, he should have made Use of this Certiorari, before Conviction, whereupon he now moved for a Certiorari to remove both the Indictment and Conviction, tho' a Writ of Error might have been proper, yet the Court granted a Certiorari specially giving a Day here by it to the Party.

The Queen versus Brown & al'. Mich. 12 Annæ,
B. R.

Joint Indictment against
3, another
Indictment
against one
of the 3, and
another a-
gainst 2 of
the 3 and a
Stranger,
and a *Certiorari* to remove all Indictments against the Three, without saying, *vel eorum aliquis*.

(2.) **W**illiam Brown, Francis Wood, and Leonard Fosbrook, were jointly indicted at the Sessions; there was another Indictment against Brown alone, and another against Wood and Fosbrooke, and one W. R. and a Certiorari was awarded to remove all Indictments, Unde iidem Willielmus, Franciscus & Leonardus indictati sunt, without saying, *vel eorum aliquis* existit: And per Curiam, none of these Indictments

ments are removed, but only that Joint Indictment first mentioned against Brown and others, and the Justices below may proceed on the other without any Contempt.

Anonymus. Mich. 8 Annæ.

(3.) **C**ertiorari to remove an Order made upon W. R. concerning Foreign Salt, and the Order being returned, it appeared to be for Salt only; and a Motion being made, to quash the Order for a fault therein, the Attorney-General Northey objected against the Certiorari, that it was misconceived, for there was no such Order to be removed, quod Curia concessit; for a Certiorari to remove an Order made concerning Foreign Salt, will not remove an Order made concerning Salt generally, it should have been to remove all Orders concerning W. R. for which Reason it was quashed.

An Order was made concerning Foreign Salt, and the Certiorari was to remove an Order concerning Salt.

Crosse *versus* Smith. Hill. 1 Annæ B. R.

(4.) **U**PON a Certiorari out of the Common Pleas to the Court of Ely, and this Writ being allowed by the Court, and they afterwards proceeding thereon, a Writ of Error was brought, and that Matter was assigned for Error. The Defendants plead a Grant of Conusance of Pleas to the Bishop of Ely, and an Allowance thereof in B. R. Anno 21 Ed. 3. and that the Cause did arise within that Jurisdiction; and this being returned on the Certiorari, and a Demurrer to it, Holt, Ch. Just. held, that there are three Sorts of Inferior Jurisdictions.

1 Salk. 148. No Jurisdiction can withstand a Certiorari.

(1.) One whereof is Tenere placita, and this is the lowest Sort, for 'tis only a concurrent Jurisdiction, and the Party may sue there, or in the King's Courts if he will.

(2.) The second is Conusance of Pleas, and by this a Right is vested in the Lord of the Franchise to hold the Plea, and he is the only Person who can take Advantage of it; for the Defendant cannot plead this to the Jurisdiction of the Court, but the Lord must come in and claim his Franchise, and there is no other Way to get the Cause from him; neither is the Court of B. R. intirely outed thereupon, for Day is given by the Roll in B. R. to the Party to be below at such a Day, where both Parties are sent down together, with the Tenor of the Record here, for them to proceed there; and if Justice is done 'tis well, if not, the Plaintiff shall have a Resummons for any Delay or Misbehaviour below, for the Cause is still under the Authority and Inspection of this Court, and the Lord's Benefit is all that is to be considered; 'tis true, these Jurisdictions are a Grievance, and

27 H. 8. cap. 24.

Com.

Complaints have often been made against them, and the Common Law, to prevent Oppression, hath always allowed Certiorari's to these Jurisdictions.

(3.) The third Sort is an Exempt Jurisdiction; as where the King grants to a great City, that the Inhabitants thereof shall be sued within their City, and not elsewhere, this Grant may be pleaded to the Jurisdiction of this Court, if there be a Court within that City which can hold Plea of the Cause, and no Body can take Advantage of this Privilege but a Defendant, for if he will bring a Certiorari, that will remove the Cause; but he may waive it if he will, so that the Privilege is only for his Benefit.

Thus there is no Jurisdiction which can withstand a Certiorari, even in a Case of a Customary Proceeding by Foreign Attachment; if the Defendant cannot find Bail below, he may bring a Certiorari, and upon putting in Bail above, the Cause shall go on there.

Parish of St. Mary in Devises. Pasch. 1702.

Certiorari to remove an Order ejus quidem tenor, instead of ordo, not good.

(5.) **U**PON a Certiorari to remove an Order, the Return was, Cujus quidem tenor sequitur in hec verba, when it should be Qui quidem ordo sequitur in hec verba, and for that Reason it was quashed, and upon Motion, a new Certiorari was granted.

The Queen versus Whittle. Pasch. 4 Annæ.

Certiorari to remove an Order, need not be signed by a Judge, but the Fiat must.

(6.) **C**ERTIORARI to remove an Order of Sessions, was superseded, because Emanavit biduo antea aliquid fiat was signed by a Judge; for per Curiam, if it be to remove an Indictment, both Certiorari and Fiat ought to be signed, if to remove an Order, the Certiorari need not be signed, but the Fiat must.

Anonymus.

Variance between the Indictment, the Certiorari. Antea 3.

(7.) **C**ERTIORARI to remove an Indictment de duobus equis felonice abductis, and the Indictment was, de uno equo furtive abducto; per Curiam, nothing is before the Court, neither have they any Warrant to proceed in this Case, for there is a Variance between the Indictment and the Writ.

CHALLENGES.

Charnock's Case.

- (1.) **C**Harnock, King and Keys, were indicted for High Treason, in conspiring the Death of the King; they were denied Counsel, but allowed Pen, Ink and Paper, and having severally pleaded Not guilty, Holt Ch. Just. told them, that each of them had Liberty to challenge thirty-five of those who were returned upon the Panel to try them, without shewing any Cause; but that if they intended to take this Liberty, then they must be tried separately and singly, as not joining in the Challenges, but if they intended to join in the Challenges, then they could challenge but thirty-five in the whole, and might be tried jointly upon the same Indictment; accordingly they all three joined in their Challenges, and were tried together and found guilty.
- Where three may join, or sever in their Challenge.

Anonimus.

- (2.) **R**uled, that where there is a Writ of Enquiry for Damages, the Jurors cannot be challenged, as other Jurors may, because this is only an Inquest of Office; but yet 'tis in the Discretion of the Sheriff to admit such a Challenge, if it appear to be a good Cause of Challenge.
- Jurors in a Writ of Inquiry cannot be challenged.

- (3.) Challenge to the Array, for that the Sheriff had not taken the Test. Sed per Curiam, this is no good Cause of Challenge, for he is still Sheriff de facto, and it would be very hard for Plaintiffs in every Trial to prove, that the Sheriff had taken the Test.
- 2 Vent. 58.
1 Cro. 369.

- (4.) When the Jury are of a Town Corporate, 'tis no Challenge, that they are not Freeholders; but where they are not of any Corporation, 'tis a good Challenge.
- 1 Vent. 366.

- (5.) Information against the Defendant for Forgery, one of the Jurors was challenged, for that the Prosecutor was lately entertained
- 1 Vent. 309.
1 Cro. 663.

tertained at his House, and this was allowed a good Challenge to the Favour.

1 Cro. 413.
Sir Christo-
pher Blount's
Case.

(6.) Information of Intrusion, a Juroꝝ was challenged for Want of Freehold, he having only 15 s. per Annum: But per Curiam, any Freehold was sufficient at Common Law; and tho' the Statute of H. 5. requires 40 s. and the 27 Eliz. 4 l. where the Damages exceed 40 Marks, yet this is only between Party and Party, and not where the Queen is concerned.

CHANCERY.

Mathews *versus* Courthope.

The Testator made a Stranger, and no Relation to him, Executor, and gave him 50 l. he shall not have the Residuum.

(1.) **T**HE Testator made one Executor, who was no Relation to him but a meer Stranger, and gave him 50 l. for his Care in the Execution of his Will; the Plaintiff being next of Kin, exhibited his Bill for the Residuum of the Estate, and no Counsel appearing on the other Side, he had a Decree nisi causa. For per Turton Just. with whom the Bar agreed, the Executor in such Case shall not have the Residuum, after Debts and Legacies paid, but the next of Kin to the Testator; and so it was said it had been decreed in the like Case, between Cordall and Cordall; 'tis true, if the Executor had been nearly related to the Testator, it might have been otherwise; but even in such Case, if there are other Relations, in equal Degree with him, and are poor and indigent, Equity in such doubtful Cases, will give the Residue amongst them.

Aston *versus* Adams. Pasch. 8 Will. III.

Prohibition to the Plaintiff in Chancery, who had brought a Bill on an *Indebitatus Assumpsit*.

(2.) **M**Otion for a Prohibition to one Adams, who had exhibited a Bill in Chancery: The Case was thus; Aston stood engaged to Adams by Simple Contract, to pay him 10 l. for curing his Son, &c. and Adams brought a Bill in Chancery

for this 101. suggesting that the Agreement was not in Writing, and that the Witnesses who could prove it were either dead or beyond-Sea; the Defendant Aston pleaded, that the Agreement was made in the Presence of W. R. now living in Holland, and traversed the rest of the Suggestion; and this being over-ruled in Chancery, Aston now moved for a Prohibition, because this is no more than a meer Indebitatus Assumpsit at Common Law; and if this Proceeding should be allowed, it would tend to the Subversion of the whole Frame of the Common Law; besides, the granting a Prohibition would prevent the Clashing of Jurisdiction; and there are several Precedents in the Register of Prohibitions, ne sequatur sub suo periculo: The Court appointed to hear Counsel on both Sides, but the Cause was agreed.

1 Ch. Rep.
fo. 63.

Anonymus. Hill. 9 Will. III.

(3.) **T**HE Testator being seised of Lands, and possessed of Goods, devised Black-acre to be sold, and White-acre to be mortgaged, for Payment of his Debts, and died so much in Debt, that if both Parcels were sold, the Money arising by such Sale would only pay the Debts, with a small Overplus, accounting also the Money arising by the Sale of his Goods and Chattels; in this Case it was decreed, that all should be sold, that the Mortgages and Judgments should be first satisfied, and that afterwards, if there should be sufficient of the personal Estate to pay the Bonds, then to pay the same, or so much of them as the personal Estate would extend to pay; and that so much of the Bonds as should remain unpaid, should come in equal Degree with the Debts upon simple Contract, and be a Charge upon the Lands, for as to them, Bonds have no Preference in a Court of Equity; 'tis true, as to Goods and Chattels, Bonds will have a Preference, because the Executor by Law is bound to prefer them before Debts on simple Contract.

Mortgages and Judgments to be paid by Sale of Lands, and Bonds and Debts on simple Contract out of the personal Estate.

Feverstone *versus* Scetle. Hill. 1697.

(4.) **D**Ecreed by Somers Lord Chancelloz, that where a real Estate is upon an equitable Title, made subject by this Court to the Payment of Debts, and it appears that there is a sufficient legal Estate, (i. e.) Goods and Chattels, to satisfy Debts upon Specialties, for which the Creditors may have Remedy at Law against the Executor; in such Case the Debts upon simple Contract, for which there is no Remedy at Law, shall be first satisfied out of the equitable Estate.

Debts upon simple Contract to be satisfied out of the equitable Estate.

Pope & al' *versus* Garland. Pasch. 11 Will. III.

Devise of
Copyhold
good with-
out a Sur-
render.

(5.) **D**Ecreed, that all Debiles by Copyholders, for the Use of Children or Creditors, and all Charges made by them upon their Lands, for the Benefit of Children or Creditors, will be good in a Court of Equity, tho' there was no Surrender to these Uses.

Phillipson *versus* Phillipson. Hill. 3 Will. III. B. R.

Where an
Heir shall be
relieved a-
gainst the
Penalty of
a Bond.

(6.) **D**ECE against an Heir upon the Bond of his Ancestor: The Defendant pleaded Riens per Descent, and at the Trial it was found against him, that he had 5 l. Assets per Descent, the Chancery will relieve him against the Penalty of the Bond, but not against the Penalty of his false Plea, because it was a voluntary Falsity.

Anonymus. Hill. 9 Will. III.

Where more
Money is
lent to the
Mortgagor
on Bond, he
shall not re-
deem with-
out paying
the Bond.

(7.) **D**Ecreed by Somers Lord Chancellor, that where the Mortgagor lends more Money upon Bond to the Mortgagor, he shall not redeem till he pays the Bond-Debt as well as the Money due on the Mortgage; but if he Mortgage his Equity of Redemption to another, the second Mortgagor shall not be affected with the Bond, for 'tis but a personal Charge upon the Mortgagor.

Anonymus.

Bill against a
Man and his
Wife abated
by the Death
of him.

(8.) **A** Bill was exhibited against Husband and Wife, for Matters chiefly concerning the Wife, they both put in their Answer, and then the Husband died, this is an Abatement of the Cause, so that the Plaintiff shall not proceed upon a Bill of Revivor, for the Widow shall not be compelled to abide by the Answer of her Husband made for her, or which he made whilst she was sub potestate Viri, but she may abide by it if she will, and if she doth, the Plaintiff may proceed, and the Decree shall bind her.

Anonymus.

- (9.) **A** Bill was exhibited to discover a Title, and whether there was an Equity of Redemption, the Defendant answered, that he was a Purchaser for a valuable Consideration, and absolutely bought the Estate of such a Person, and had no Notice of any Title; and this was adjudg'd a good Plea. See *Hardres* 510.

Purchase for a valuable Consideration without Notice of any Incumbrance, a good Plea.

Daris's Case.

- (10.) **A** Man contracted for the Purchase of Lands, but before the Conveyance was made he died, having devised the Land, &c. Et per Curiam, the Devise is good, because the Vendor, after the Contract, stood Trustee for the Vendee.

Contract for a Purchase, and before the Conveyance made he died, the Vendor is a Trustee for the Vendee.

Church and Church-wardens.

- (1.) **I**n a Prohibition it was ruled, that the Plaintiff cannot entitle himself to a Seat in navi Ecclesiæ by Prescription generally, without shewing some Special Matter, as Repairing, &c. otherwise if it be an Isle, but if he entitle himself to a Seat, in navi Ecclesiæ generally, he must give repairing in Evidence, but an Isle may be upon the Land of a private Person.

Seats in the Church. Sid. 88, 203. 1 Lev. 71.

- (2.) **I**n Trespals for breaking and cutting in Pieces his Pew, and taking it away; the Defendants pleaded, that they were Church-wardens, and that the Plaintiff had built it in the Church without License, per quod, &c. Et per Curiam, the Trespals is confessed, for tho' they may remove the Seat, they cannot cut the Timber and Materials into Pieces.

Noy 108. Gibson's Case.

- (3.) **I**f one and his Ancestors have, Time out of Mind, repaired an Isle in a Church, and sat there with his family, and buried there, 'tis good Evidence that the Seat is proper and peculiar to him, but then he must repair it at his own Charge, and not with

Noy 104. Day's Case.

with the Help of the Parish, for if he doth not, the Ordinary may appoint who shall sit there.

Noy 133.
Sir W. Hall's
Case.

(4.) The chief Seat in the Chancel belongs to the Impropriator of common Right; and by Consequence to the Farmer of the impropriate Tithes, but by Prescription it may belong to another.

Burials.
Noy 145.

(5. The Church-Book for Burials and Christenings began in the thirtieth Year of H. 8. at the Instance of the Lord Cromwell.

Noy 104.

(6.) The Ordinary and Church-wardens cannot licence one to bury in the Church, but it ought to be by the Parson, because the Freehold is in him.

Anderton *versus* Walker.

2 Lutw.
Custom to
pay for Bap-
tism and Bu-
rials, triable
at Law.
* Cap. 13.

(7.) **A**LL Offerings which are due to the Vicar for Sacraments, Marriages, and Burials, and payable to him by the Laws and Customs of the Realm, are confirmed by the Statute * 2 Ed. 6. but then such Custom must be tried in the Temporal Courts; therefore, where the Curate of Bridlington libelled against T. S. for not paying a Shilling for baptising his Child, setting forth in his Libel a Custom in the said Parish for every Parent so to do, &c. the Defendant suggested for a Prohibition, that by Law no Man ought to pay for baptising his Child, &c. against his Will, that Customs and Prescriptions were properly triable at Law, and that the Curate, &c. had libelled against him, &c. setting forth the Custom as aforesaid, and a Prohibition was granted.

Thompson *versus* Davenport.

2 Lutw.
Custom to
pay Money
for marry-
ing, triable
at Law.

(8.) **S** where the Plaintiff libelled against the Defendant, setting forth a Custom in the Parish of Elington in Derbyshire, that every Woman, who is a Parishioner, and dwelleth there, and marrying with a Licence, their Husbands at the Time of the Marriage, or soon after, shall pay to the Vicar 5s. as an accustomed Fee, and so brings his Case within that Custom; the Defendant suggested for a Prohibition, that all Customs are triable at Common Law, and that the Plaintiff had libelled against him, setting forth the Custom as aforesaid, &c. and a Prohibition was granted.

Parker versus Clerke.

(9.) **T**HE Clerk of a Parish libelled against the Church-wardens, for so much Money due to him by Custom every Year, and to be levied by them on the respective Inhabitants in the said Parish; and after Sentence in the Spiritual Court, the Defendants suggested for a Prohibition, that there was no such Custom as the Plaintiff had set forth in his Libel; it was objected, against granting the Prohibition, that it was now too late, because it was after Sentence, especially since the Custom was not denied; for if it had, and that Court had proceeded, then, and not before, it had been proper to move for a Prohibition. But per Holt Ch. Just. 'tis never too late to move B. R. for a Prohibition, where the Spiritual Court had no Original Jurisdiction, as they had not in this Case, because a Clerk of a Parish is neither a Spiritual Person, nor is this Duty in Demand Spiritual, for 'tis founded on a Custom, and by Consequence triable at Law; and therefore the Clerks may have an Action on the Case against the Church-wardens, for neglecting to make a Rate, and to levy it, or if it had been levied, and not paid by them to the Plaintiff.

Mod. Cases 252.
Where the Spiritual Court hath not an Original Jurisdiction, 'tis never too late to move for a Prohibition.

The Churchwardens of St. Bartholomew's Case. Mich.
12 Will. III. B. R.

(10.) **O**N E Fishburne left 25 l. per Annum, for the Maintenance of a Weekly Lecturer, and appointed, that the Lecturer should be chosen by the Parishioners, and to preach on any Day in every Week as they should like best. The Parishioners fixed on Thursday, and chose a Lecturer every Year; and now Mr. Turton being Lecturer, and the Parish having chosen Mr. Rainer, the other would not submit to the Choice, whereupon the Churchwardens shut Turton out of the Church; afterwards the Bishop of London determined in his favor, and granted an Inhibition and Monition for that Purpose. And per Holt Ch. Just. a Prohibition was granted to try the Right; 'tis true, a Man cannot be a Lecturer without a Licence from the Bishop or Archbishop; but their Power is only as to the Qualification and Fitness of the Person, and not as to the Right of the Lectureship; and the Ecclesiastical Court may punish the Churchwardens, if they will not open the Church to the Person, or to any one acting under him, but not if they refuse to open it to any other.

The Archbishop or Bishop must licence a Lecturer, but they cannot determine his Right to the Place.

The Queen versus Guise. Mich. 2 Annæ.

Mod. Cases
89.
Return of a
Mandamus,
that the
Churchwardens
were
not debite electi,
without
saying nec eorum
aliquis,
not good.

A Mandamus was granted to swear two debite electi Church-wardens of, &c. The Return was, that they were not duly elected, but did not say, nec aliquis eorum, and for that Reason it was quashed, for he who makes the Return must comply with the Writ as far as he can, and if one of the two is duly elected, as where the Parish claims a Right to choose one Church-warden, and the Parson another, they ought to swear one, and to return the Special Matter as to the other; that if the Parishioners have only a Right to choose one, and they choose two, the Election is void; but if two are chosen by the Parish by equal Voices, when they ought to choose but one, in such Case they cannot tell which to swear into the Office, but then they must return all this Special Matter; so if the Parishioners are to choose and present them to the Parson, who is to choose one of them, and they both bring a Mandamus, that Matter may be returned, for they cannot tell which to swear.

Britton versus Standish. Trin. 3 Annæ.

Mod. Cases
182.
1 Salk. 166.
A Parishioner
is not bound to
come to his
own Parish
Church, if
he goes to
any other.

* 1 Eliz. cap.
2. Par. 14.
Linw. 8, 143,
184, 227.
Spar. 78.

3 Jac. 1. cap.
4. Par. 27.
Spelm. Con-
cil. 1 Part
193. 2 Part
141.
1 And. 138.
2 Cro. 480.

(12.) **S** Standish, the Parson of H. libelled against Britton, for not coming to his Parish Church on Sundays, and for not receiving the Sacrament at Easter: The Plaintiff suggested for a Prohibition, that the Bounds of Parishes and the Constructions of Statutes, belonged to the Jurisdiction of the Temporal Courts, &c. The Question was, whether a Parishioner is bound by Law to come to his own Parish Church, or whether he is excused if he go to some other Church, as it appeared the Plaintiff did? It was insisted against the Prohibition, that by the Statute * 1 Eliz. every Parishioner is obliged to come to his Parish Church, which Statute is still in Force, and not altered by any subsequent Act, but only by the Act of Toleration in Respect to Dissenters; on the other Side it was admitted, that the Words of the Statute 1 Eliz. are, that every Parishioner shall repair to his Parish Church; but that those Words were corrected or explained by some subsequent Statutes; as for Instance, by the Statute * 3 Jac. by which every Parishioner is required to repair to his Parish Church, or to some other Church; 'tis likewise corrected by the Act of Toleration. Holt Ch. Just. Parishes were instituted for the Ease and Benefit of the People, and not of the Parson; and if every Parishioner is obliged to go to his Parish Church, then the Gentlemen of Gray's-Inn and Lincoln's-Inn must no longer repair to their respective Chapels, but to their Parish Churches,

Churches, otherwise they may be compelled so to do by Ecclesiastical Censures. But per Powell Just. the Spiritual Courts have always exercised this Jurisdiction, and after so long Usage, it ought not now to be questioned; and as for the Gentlemen of Gray's-Inn and Lincoln's-Inn, they have likewise used to repair to their Chapels, and therefore may be exempted from coming to their Parish Churches, and this by Vertue of an Usage against Usage: Now the Reason why Parishioners must come to their Parish Churches, is not (as hath been observed) for the Benefit of the Parson, or that he may have his Offerings, but because he having charged himself with the Cure of their Souls, he may be enabled to take Care of that Charge. But at another Day, Holt Ch. Just. held, that if a Man repaired to any other Chapel, it would be a good excuse for his not coming to his Parish Church, but then he must plead it; he likewise held, that if Britton, the Plaintiff in this Prohibition, was a professed Churchman, and his Conscience would permit him sometimes to go to the Meetings of Dissenters, that the Act of Toleration would not excuse him for not coming to Church, for that Act was not made to give Ease to such People; so a Rule was made for a Prohibition, and that the Plaintiff should declare on it, that the Matter might come judicially before the Court.

2 Roll. Rep:
455.
Hard. 406,
407, 503.

Harman *versus* Renew. Trin. 7 Will. III. B. R.

(13.) **I**N this Case, which see in 1 Salk. it was held, That at Common Law two Churches might be united by the Concurrence of the Patron, Parson and Ordinary; it was farther held, that tho' in such Case there is but one Parson to both Churches, yet the two Churches remain, and the two Patronages, and the two Parishes. But where they are united by Act of Parliament, as in the Principal Case, the Parish of St. Mary Bothaw was per Statute 22 Car. 2. united to the Parish of St. Swithin, and the Question arising, whether after such Union the Parishioners of St. Mary Bothaw should contribute towards the Repair of the Parish Church of St. Swithin, it was adjudged, that they should; because where two Parishes are united by Act of Parliament, one of those two Parishes is extinct, and both Patrons present but as to one Church, tho' 'tis alternis vicibus.

1 Salk. 164.
Of the uniting two Parishes.

22 Car. 2.
cap. 11.

King *versus* Rice.

3 Mod. 325.
Churchwardens, how
chosen in
London, or
elsewhere.

(14.) **I**N London both the Church-wardens are chosen by the Parishioners; in other Places the Parson appoints one, and the Parish the other: Per consuetudinem Angliæ, they are sworn and admitted by the Archdeacon, and tho' they are unfit, he cannot refuse them.

CITATION.

The Bishop of St. David's Case. Hill. 10 Will. III.
B. R.

3 Mod. 433.
Archbishop
hath a Pro-
vincial Pow-
er over all
the Bishops
of his Pro-
vince.

(1.) **T**HE Bishop of St. Davids was sued before the Archbishop of Canterbury for Simony, and was cited to answer at Lambeth, and not at the Arches, and it was to appear there before the Archbishop himself, and not before his Chancellor or Vicar-General, and for these Reasons he moved for a Prohibition; but the Court denied it, because the Archbishop hath a Provincial Power over all the Bishops of his Province, and may hold his Court where he will, either at the Arches or elsewhere; and he may likewise convene the Party before himself, and judge himself, and so may any other Bishop, for the Power of a Chancellor or Vicar-General, is only a delegated Power in Case of the Bishop.

Machin versus Moulton. Hill. 11 Will. III. B. R.

3 Mod. 450.
For subtrac-
ting Tithes,
the Party
shall be sued
in the Dio-
cese where
subtracted.

(2.) **M**oulton was Parson of S. in the Diocese of York, with-
in which Parish Machin had Lands, but lived in Lin-
coln in another Diocese, and now coming to York, Moulton sued
him in the Spiritual Court there, for Subtraction of Tithes;
and

and it was insisted against the Parson, that this was a Ciring him out of his Diocese ; at first the Court held, that the Residency of the Party draws the Cause to the Diocese where he lives, in transitory Matters, but not in local ; as for Instance, an Executor must be sued for a Legacy where the Will was proved, and not where he lives : But afterwards this Case was ruled to stand upon a single Reason, for whatever the Law might be in other Instances, yet in the Case of * Tiches, the Statute 32 H. 8. expressly enacts, that the Party subtracting them shall appear before the Ordinary of the Diocese where they were subtracted, and therefore a Consultation was granted in this Case. * 2 Lev. 91.

COLOUR. See Pleas 6.

COMMITMENT.

Elderton's Case. Mich. 2 Annæ.

(1.) **E**Lderton was committed by the Board of Green-Cloth, for executing a Fi. Fa. in Whitehall, and upon the Return of an Habeas Corpus it was argued to be lawful, and not at all prejudicial to the Privilege of the Palace, and that they had no Power to commit for Breach of the Peace, having a Power only over the Queen's Family, for the Government of the menial Servants, and that the Privilege of Whitehall was by the Statute * 28 H. 8.

Mod. Cases 73.
The Queen's Palace hath no Privilege where she is totally absent.
Postea Privilege 11. S. C.
* 28 H. 8. cap. 12.

Northy Attorney-General on the other Side argued, that there is a standing Commission of the Peace for the Verge and Palace,

N 2

and

and that the Officers of the Green-Cloth are always Commissioners; and that the Statute 28 H. 8. did not create the Privileges of a Palace, but only ascertain'd the Boundaries thereof; for the Queen may declare any House to be her Palace without the Parliament; and such Declaration being made under the Great Seal, it afterwards continues a Palace, tho' the Queen doth not reside there.

Powell Just. The Privilege of the Palace is by Common Law, and that in respect of the King's Presence: Breaking the Exchequer hath been held to be Burglary, tho' none of the King's Money was there; and one Jones had his hand cut off for a Murder committed by him in the Tower, and was afterwards executed.

Holt Ch. Just. doubted the Case of Burglary in breaking the Exchequer, &c. and denied Jones's Case, because the same Fact cannot be a Misprision and a Murder, for the one will extinguish the other; he said, that it was true, his hand was cut off, but it was without any Manner of Authority, for he had seen the * Roll, and there was no Judgment for it; he was of Opinion, that where the Queen was totally absent, and neither present by her self or by any of her Domesticks or Family, the Place hath no Privilege; but 'tis otherwise where it was only a personal Absence for a little Time: The Queen at this Time was at Windsor; now whilst she was there, suppose a Murder had been committed in Whitehall, shall the Fact be tried before the Lord Steward; and he held that it should not.

* Mich. 15
& 16 Eliz.
Rot. 2. Burdett v. Mufkett.

Clerke's Case.

5 Mod. 64,
156.
Custom returned for the Mayor, &c. to commit to the Sheriff, and it did not appear that the Person to whom he was committed was Sheriff.
* 1 Vent. 115.

(2.) **T**HE Return of an Habeas Corpus was, that there was a Custom in London, that if a Man chosen of the Livery of any Company should refuse to take upon him the Office, that the Mayor and Aldermen might commit such Person * until he should declare, that he would take upon him the Office, and that Clerke was chosen a Livery-man of the Company of Vintners, and refused to hold the Office, and thereupon he was committed by a Warrant in Writing, &c. until he should declare, &c. it was objected, that this Return was ill, because it did not set forth to whom he should declare his Consent; besides, it was an insignificant Custom, to commit until he should declare, because after such Declaration he might still refuse to hold the Office; they might impose a Fine to be levied by Distress, but they cannot commit; 'tis true, a Custom to commit until he should take upon him the Office of an Alderman, is good, because 'tis an Office for Administration of Justice, but a Livery-man is not such an Office: Another Objection against the Return was, that

the

the Warrant of Commitment should have been returned in hæc verba: But per Curiam, this Commitment being by a Court of Record, the Warrant need not be returned in hæc verba, as it ought if it had been extrajudicial Commitment: But the chief Objection was, that here was a Custom returned for the Mayor and Aldermen to commit to the Sheriffs of London, &c. or any other Officer; and the Return was, that he was committed Custodiæ meæ, without saying, he was Sheriff of London, or any other Office attending the Court; and for this Reason it was adjudged insufficient.

The King versus Wright.

- (3.) **T**HE Justices of Peace committed T. S. for a forcible Entry, and G. H. was indicted for suffering him to Escape; upon Not guilty pleaded, the Defendant was found guilty, and afterwards he brought a Writ of Error, for that it did not set forth how this Commitment was made, (viz.) whether upon View of the Force by the Justices, or upon an Indictment found; neither is it set forth, that debito modo commissus fuit: Sed per Curiam, 'tis only an Inducement to the Offence laid in the Indictment; besides, after a Verdict it shall be intended, that the Commitment was legal.

1 Vent. 169.
Indictment
for suffering
a Man com-
mitted for a
forcible
Entry to
Escape.

C O M M O N.

- (1.) **H**E who hath Common appendant or appurtenant, can keep but a Number of Cattle proportionable to his Land, for he can Common with no more than the Land to which his Common belongeth is able to maintain.

Jones 282,
286.

- (2.) One cannot prescribe to have sole Common of Pasture, excluding the Lord, but a Man may prescribe to have solam pasturam omni Anno omni tempore Anni, for this is not Common but Pasture, and the Lord is not excluded from the whole Profits, for he has the Trees & Mines.

2 Lev. 2.

- (3.) And such a Prescription is good, without alledging Levancy and Couchancy, but 'tis otherwise in Case of Common, for that

that ought to be of such Cattle as are levant and couchant upon his Tenement, because the Levancy, &c. is the Measure of the Profit in the Common.

(4.) One who hath solam pasturam, may licence another to put in his Cattle.

(5.) And so may one who hath Common in gross for a certain Number, because such a Common is neither appendant, nor a Common in gross sans nombre.

(6.) So where a Man hath solam pasturam, he may licence another pro hac vice, to depasture his Cattle, but not for any Time certain, so that would amount to a Lease of a Thing (which lies in grant) and without Deed.

2 Lev. 73.

(7.) A Common appurtenant to a Messuage and Lands may be aliened, if 'tis for a certain Number of Beasts, otherwise where 'tis a Common appurtenant for all Beasts levant and couchant on the Land.

2 Lutw. 1240.

(8.) One Commoner cannot distrain the Beasts of another Commoner depasturing in the Common, but he may the Beasts of a Stranger, because he had no Pretence of any Right.

Woolston *versus* Slater.

3 Lev. 104.
Commoner
cannot di-
strain the
Beast of a
Stranger,
without
shewing how
he is damni-
fied in his
Common.

(9.) **I**N Replevin, the Defendant avowed for Damage-feasant on his Common; and upon a Demurrer to this Avowry it was adjudg'd not good, because he did not shew some particular Damage to himself, or that he could not have his Common in tam Amplo modo quo debuit & consuevit; for a Commoner cannot justify to distrain the Beast of a Stranger, without shewing how he is damaged in his Common.

C O N-

C O N D I T I O N .

(1.) **T**HE Condition of a Bond is always to be taken and construed in Favour of the Obligor, because 'tis the Words and Concession of the Obligee; and wherever any Sense can be collected out of the Words, it shall never be construed to be insensible, because 'tis to save a Forfeiture.

Jones 182.
Saund. 66.

(2.) Where a Man is bound in a Bond with a Condition, not to Trade, both Bond and Condition are void; but if he was bound not to Trade in a particular Place, 'tis good.

(3.) These Diversities were taken by Holt, Ch. Just. R. Where in Executory Contracts the Agreement is, that one shall do such an Act, and for the doing thereof the other shall pay so much Money, there the doing the Act is a Condition precedent to the Payment of the Money, and the Party shall not be compelled to pay till the Act is done.

Condition
precedent.

1 Vent 177,
214.

(4.) Where a Day is appointed for the Payment of Money, which Day happens before the Thing contracted for can be performed, there an Action may be brought for the Money before the Thing is done, because here it appears, that the Party relied upon this Remedy, and never intended to make the Performance of the Thing a Condition precedent.

1 Vent. 147.
1 Saund. 317.

(5.) Where a certain Day of Payment is appointed, which is to enure at a Time subsequent to the Performance of the Act, which by the Contract the Party had agreed to do, there Performance must be averred, and so is Jones 218 to be understood; and some other Books contrary to this are not Law, for every Man's Bargain ought to be performed as he intended it; and where a Man relies upon his Remedy, 'tis but just that he should stand to his Agreement, so, on the contrary, there is no Reason he should be compelled to trust when he did not intend it.

Dyer 76.
contra.

(6.) And therefore where two agree, that one shall have his Horse, and the other shall pay so much Money; no Action lies for the Money till the Horse is delivered.

Page *versus* Heyward. Trin. 3 Annæ.

Where he
who is to
perform a
Condition
may be dis-
abled, where
not.

(7.) **A** Djudged, that where he who is to perform a Condition is only in Nature of a Trustee or Instrument, there a temporary Disability is absolute and for ever; but where the Performance is for his own Advantage, 'tis otherwise, for the Disability may be removed, and then he may perform the Condition.

CONSIDERATION.

Hutt. 77.

(1.) **T**HE Defendant promised, that in Consideration the Plaintiff would pay the Money due to him on Bond on such a Day, that he would deliver up the Bond; adjudged a good Consideration, because now he might have the Money without putting the Bond in Suit.

Sid. 89.

(2.) A Surety having paid the Debt of his Principal, who was dead, told his Executor, that he had paid the Money, who thereupon promised to repay him, if he would forbear till such a Day; adjudged a good Consideration, for the Executor was liable in Equity, tho' not at Law without a Promise.

(3.) A Promise upon a Consideration executed or past, unless 'tis grounded upon a precedent Request, is not good, but where it was made upon Request, the subsequent Promise relating to it shall prevail; as for Instance, if a Promise is made at the Time of the Request, for there the Consideration is meritorious: Thus a Promise to pay 10 l. for that W. R. was Bail for my Servant, is not good; but a Promise to pay 10 l. for that he was Bail at my Request for him, is good.

(4.) A Promise grounded on a Consideration executory, or which continues, is good, tho' the Consideration was without Request; as for Instance, for that you married my Daughter, I promise to give you 100 l. good, or for that I owe you 20 l. lent to me, I promise to pay you on such a Day, this is good, for the Debt continuing, the Consideration must continue.

(5.) But where the Plaintiff declared, that in Consideration he would discharge the Defendant from 22 l. due from him to W. R. his Master, he (the Defendant) promised to lay out 40 l. in repairing the Plaintiff's Barge; this was held void, and the Consideration illegal, for the Plaintiff cannot discharge a Debt due to his Master.

Thornburgh *versus* Whitacre.

(6.) **A** Sumpsit in Consideration of half a Crown by him given to the Defendant, he promised to give him (the Plaintiff) two Grains of Rye on Monday following, and so on every Monday double, by Progression, for one Year: The Defendant pleaded Non Assumpsit, and upon a Motion to stay the Trial, it was denied; for per Curiam, tho' it amounts to a great Quantity, yet the Jury will consider the Folly of the Defendant, and give reasonable Damages.

Mo. l. Cases
305.
1 Lev. 111.
S. P.
Consideration tho' not good, yet the Jury may give reasonable Damages.

CONSPIRACY.

(1.) **W**HEN Conspiracy is the Gift of the Action, if one be acquitted, the other cannot be found guilty, but where the Gift of the Action is upon another Matter, and the Conspiracy is only laid by Way of Aggravation, if one be acquitted, the other may be found guilty; but in both Cases, if one be found guilty, and the other dies or doth not come in, Judgment may be given against him who was found guilty.

1 Vent. Thodie's Case.

(2.) Where a Man is falsely and maliciously indicted of any Crime, which may prejudice his Fame or Reputation, he may have an Action for the Conspiracy.

(3.) And so he may, tho' the Offence for which he was indicted doth not import Slander, but endanger his Liberty (i. e.) where 'tis such for which he may be imprisoned.

(4.) And so he may, if the Indictment is only injurious to his Property, in putting him to a needless Expence in defending himself.

F. N. B. 116. (5.) And in these Actions 'tis not the Conspiracy but the Damages, which are the Ground of them; and therefore per Holt Ch. Just. one may be acquitted and the other found guilty, which cannot be in a Writ of Conspiracy.

(6) Where there is a malicious Indictment in Prejudice of the Fame and Reputation of another, tho' the Indictment is erroneous, or an Ignoramus is found, yet an Action will lie, for the Mischief arises by the Slander; but 'tis otherwise where the Indictment is for a Trespass, or for a Riot, because in such Cases the Defendant is indicted in Respect of an Injury to his Purse, which cannot be where 'tis erroneous, or an Ignoramus found.

(7.) Action on the Case for causing and maliciously procuring him to be indicted for a Riot, by Reason whereof he was put to great Charge in defending it, good, for he was damaged in his Property, and that out of Malice; but in such Case the Plaintiff must prove express Malice in the Defendant, and not only that he (the Plaintiff) was innocent.

Nota, most of these Points were adjudged in the Case of Savill and Roberts. Quod Vid.

CONSTABLE.

Charley Parish's Case. 9 Will. III. B. R.

Where a Constable may execute a Warrant out of his Parish, where not.

(1.) **T**HE Village of Charley having no Constable, the Justices by Order of Sessions appointed one; but per Holt Ch. Just. where there is no Leet the Constable ought to be chosen in the Town, out of which the Leet was derived; 'tis true, the Justices have exercised this Power, and rather than to deprive them of it, this Court will intend, they have sufficient Authority by some Act of Parliament, and therefore if a Town be erected they may nominate and appoint a Constable; but Charley having no Constable, 'tis no Vill but a Hamlett, for a Vill and a Constable are

are reciprocal : And as to the Authority of a Constable out of his Parish, he held, that if a Warrant is directed to a Constable by Name, he may execute it at any Place in the County, tho' he is not compellable to do it out of his Parish : But if 'tis directed to all Constables generally, in such Case 'tis to be taken respectively, and no Constable can execute it out of his Parish.

(2.) When the County was first divided into Hundreds, a Constable, or conservator pacis, was appointed in every Hundred, and this was in Aid of the Sheriff, who was the general Conservator Pacis thro' the whole County ; and so also in Assistance of the Constables who had the whole Hundred, Petty Constables came at last to be appointed in every Town.

(3.) At first both the Constable and Petty Constable were appointed by the Sheriff in his Tourn, and there they were sworn, but now they are commonly appointed at the Court-Leet, and in Default thereof by the Sessions.

(4.) And as to his Authority out of his Parish : Per Holt Ch. Just. If a Warrant is directed to such a Constable by his Name, he may execute it in any Place in the County, tho' he is not compellable so to do, or to do it out of his Parish ; but if the Warrant is directed to all Constables in general, then 'tis to be taken respectively, and in such Case a Constable cannot execute it out of his Parish.

C O P Y H O L D.

Fisher *versus* Nicholls. Hill. 12 Will. III. B. R.

(1.) **I**N this Case Holt Ch. Just. held, that Copyhold Estates are subject to the Rules of Law, and will not pass by such Words in a Conveyance as are improper to pass other Estates, unless there is a Custom for that Purpose, for that may and often doth distinguish them ; thus by Custom in some Pa-

Postea De-
vise 10.
Copyhold
Estates are
subject to the
Rules of
Law.

noys a Grant to A. B. and C. Shall be construed as a Gift to A. for Life, Remainder to B. for Life, Remainder to C. for Life.

Page *versus* Smith. Mich. 8 Will. III.

What is Copyhold, and what not.

* 2 Lutw. 1171.

(2.) **I**N this Case, per Holt Ch. Just. whatever may pass by Deed without Surrender, tho' it may be necessary to enroll the Deed, is no Copyhold; likewise whatsoever may pass by Surrender * *secundum consuetudinem Manerii*, without saying, *ad voluntatem Domini*, is no Copyhold.

1 Lev. 26.

(3.) Adjudged, that where a Copyhold is forfeited, the Lord may grant it without a Seizure, for the Forfeiture is a Determination of the Will of the Party, and the Lord is in as of his Reversion.

(4.) A. Dominus pro tempore habens titulum, dispenses with the Forfeiture by admitting a Copyholder who hath forfeited, and that not only as to himself but also to him in Reversion, for his Grant and Admittance amounts to an Entry for the Forfeiture and new Grant.

(5.) But an Admittance by a Lord who hath no Title, but is a Disseisor, cannot purge the Forfeiture. *Ibid.*

Hard. 293.

(6.) A Covenant to surrender Copyhold-Lands to W. R. the Covenantor surrendered to two Copyholders out of Court, to the Use of W. R. adjudged this is a good Performance of the Covenant, for this is a good Surrender.

C O R O N E R.

1 Lev. 120.

(1.) **H**E is chosen by the County, and therefore his Office doth not determine by the Demise of the King.

Poph. 209.

2 Lev. 141.

(2.) He cannot take an Inquisition but upon View of the Body, therefore where one drowns himself, and the Body cannot be found, the Inquisition must be taken by Commission or by Justices of Peace, or Justices of Assize may make Inquisition without

a Commission, and such Inquisitions are traversable, tho' an Inquisition taken before a Coroner is not as it hath been sometimes held; but antiently it was traversable in all Cases, but where it was fugam fecit, and so 'tis now. 2 Lev. 141.
152.

(3.) Therefore where a Coroner's Inquest found W. R. felo de se, his Executors were admitted to traverse it, but the Inquest was quashed for the Omission of the Word Murdravit. 2 Lev. 152.

(4.) A Coroner's Inquest super visum Corporis, found that W. R. felonice seipsum in Rivum misit & in Rivo prædicto seipsum emergit, & sic seipsum murdravit, this was quashed, for emergo is to rise out, and not to sink down in the Water, and the Going into the River is not Felony nor felonious, but 'tis the Drowning that makes it Felony; therefore the Conclusion, & sic seipsum murdravit without the Premises, is naught; for 'tis not sufficient to find a Man murder'd himself, without shewing how.

(5.) A Coroner's Inquest may be set aside for a Misbehaviour of him in his Office, and a Melius inquirendum by B. R. as Supreme Coroner, or B. R. may issue out a Commission, or Justices of Oyer and Terminer may inquire, but there cannot be a Melius inquirendum to the Coroner. 1 Vent.

(6.) Upon an Indictment and Trial for a Murder, Depositions taken before the Coroner may be given in Evidence, if the Witnesses are dead. 1 Lev. 180.

(7.) He must write down the Effect of the Evidence given, and certify it to the Justices of Gaol-Delivery, and bind over the Witnesses to appear. 3 H. 7. cap. 1.
1 & 2 Ph. 8.
M. cap. 13.

C O R P O R A T I O N .

Anonymus.

What is a Corporation.

(1.) **P**ER Holt Ch. Just. A Corporation is an Ens civile, a Corpus politicum, a Persona politica, a Collegium, an Universitas, a jus habendi & agendi; some are constituted for publick and others for private Charities; the former are not subject to any Founder, or particular Statutes, but to the general Laws and Statutes of the Realm, by which they are maintained and supported; but private Charities are subject to the Rules and Ordinances of the Founder, who by Law is Visitor, unless he appoint another.

Anonymus. Mich. 10 Will. III. C. B.

Corporation by Prescription may have several Names, but if by Charter it can have but one Name.
See Hardres 405.

(2.) **A** Corporation, per Treby Ch. Just. and Powell Just. if by Prescription, may have several Names; but if by Charter, 'tis otherwise, for in such Case it cannot have several Names at the same Time and to the same Purpose; for if a new Charter is granted, and by a new Name, the old one is gone; as in the Case of Baptism by one Name, and Confirmation by another, but such Corporation may have several Names to several Purposes; for it may be created per nomen D. to take and to grant, and per nomen F. to sue and be sued.

College of Physicians versus Salmon. Trin. 13 Will. III.
B. R.

5 Mod. 327.
2 Salk. 451.
Corporation must have a Name, either express or implied in the Patent.

(3.) **I**N this Case it was held by Holt Ch. Just. that where my Lord Coke says, a Corporation must have a Name, it must be understood, either as expressed in the Patent, or implied in the Nature of the Thing; as if the King should incorporate the Inhabitants of Dale, and give them Power to choose a Mayor; in this Case, tho' there is no Name of Incorporation in the Patent, yet it would be a good Incorporation, and the Name

would

would be Mayor and Commonalty; so the City of Norwich was incorporated by a Grant of H. 4. by the Name of Mayor and Sheriffs, and they are called, Mayor, Sheriffs and Commonalty.

The Mayor of Thetford's Case. Hill. 1 Annæ.

(4.) **A** Mandamus being returned without the Common Seal, and without the Hand of the Mayor; and it being moved, that tho' it was returned in the Name of the Corporation, yet it was no corporate Act to charge the Corporation, without their Common Seal, nor the Mayor without his Hand, and therefore one or both ought to be done; whereupon the Court ordered Precedents to be searched, and it appeared that there were many without the Common Seal, and without the Mayor subscribing his Name; and it was held by Holt Ch. Just. to whom the Court agreed, that a Corporation may do an Act on Record without their Common Seal; that this is the Case of the City of London every Year, who make an Attorney yearly in this Court by Warrant of Attorney, without Sealing or Signing it, and the Reason is, because they are estopped by the Record to say, that it is not their Act; and therefore, if an Action should be brought against the Corporation for a false Return, they are estopped to say, that 'tis not their Return, for 'tis Responsio Majoris, &c. upon Record; and as to the Hand of the Mayor, 'tis a sufficient Evidence to charge him, that the Mandamus was delivered to him, and that it hath his Return, and 'tis incumbent upon him to shew the contrary; for the Mayor or any other Magistrate of the Corporation, who caused or procured the Return, are chargeable in their Private Capacities, if 'tis false.

1 Salk. 192.
Where a Corporation may do an Act on Record, without their Common Seal.

Newton versus Travers. Mich. 8 Will. III.

(5.) **A** Djudged, that a Dean and Chapter, or a Warden and Fellows of a College, may Grant or Lease by the Name of Dean and Chapter, &c. and without shewing their proper Names; and so they may plead or be impleaded, because in their corporate Capacity they have no Name of Baptism, or any other Name than that by which they are incorporated; but 'tis otherwise in the Case of a Parson and Vicar, for they must Use their Name of Baptism.

How a Dean and Chapter may Lease.
1 Leon. 307.
1 Inst. 3. a. contra.

Anonymus. Pasch. 13 Will. III.

Corporation
not appear-
ing to an
Action.

(6.) **A**N Action was brought against the East-India Compa-
ny, who are a Corporation, and the Action was for
5000 l. and several Distringas's served, but they did not appear;
whereupon the Court was moved, that they might have exem-
plary Issues returned, and a Rule was made, that the Sheriff
should return good Issues, otherwise to bring an Action against
him for not doing it; but at last he was ordered to attend.

Corporation
not appear-
ing, there
cannot be a
Seizure with-
out a Sum-
mons.

(7.) An Information was exhibited against the Bailiffs and Bur-
gessees of Yarmouth, one of the Bailiffs (there being two) appointed
an Attorney to appear, but the other would not consent, and
the Court was moved, that their Liberties might be seized for
Want of an Appearance: But the better Opinion was, that
upon an Information in Nature of a Quo Warranto, which is
datum est Curiae intelligi, and which is in Nature of a personal
Action, there cannot be a Seizure before a Summons (i. e.) the Li-
berties cannot be seized upon a Venire facias, but upon a Distrin-
gas; but 'tis otherwise in a Quo Warranto, for there 'tis Sum-
monitus fuit; then it was made a Question, whether a War-
rant of Attorney made by one of the Bailiffs, was not sufficient,
because the Corporation did not disavow it, but that was not de-
termined.

C O S T S.

The King versus Summers. Pasch. 1 Annæ.

Costs taxed
after the Cer-
tiorari, with-
out consider-
ing the Costs
below.

(1.) **T**HE Defendant was indicted for a Trespas, and also
for a Riot; and upon Not guilty pleaded, it was re-
moved into B. R. by Certiorari, and the Defendant went before
the Master, who taxed Costs; and the Court was moved, that
he might go before the Master again, that the Prosecutor might
be

be considered in the Costs for his Charges below, the Master having only taxed Costs in Respect to the Charges since the Certiorari; and per Curiam, The Master ought not to consider the Charges below, but only upon the Certiorari; then it was moved to aggravate the Fine, but that was denied, since the Party had been before the Master, and if he insisted on it, the Court would set aside the Costs already taxed.

Bigland *versus* Robinson. Hill. 8 Will. III. B. R.

(2.) **A**Djudged, that where Executors sue upon any Contract of their Testator, or for any Wrong done to him, they shall pay no Costs either upon a Nonsuit or Verdict against them; so wherever he must sue as Executor, as for Instance, he brought an Action of Debt upon a Bond due to his Testator, the Defendant pleaded Payment of the Money to himself (viz.) to the Executor, upon which they were at Issue, and a Verdict against the Plaintiff, yet he paid no Costs; but if he had brought the Money into Court, then the Plaintiff must proceed at his Peril.

Executors
pay no
no Costs.

Jenkins & Ux' *versus* Plombe. Hill. 2 Annæ B. R.

(3.) **D**EBT by Husband and Wife, as Executors of W. R. in which they declared, that the Defendant was indebted to them as Executors for so much Money, received by the Defendant for them as Executors; upon Non Assumpsit pleaded, the Cause came to be tried, and the Plaintiffs were Non-suited; and in this Case several Points were resolved by Holt Ch. Just. to which the Court agreed.

Mod. Cases
21, 181.
1 Salk. 206.
Where Husband and
Wife must
join in the
Action.

(1.) Where a Man marries a Woman, who is an Executrix, and if before the Marriage a Stranger receives Money due to the Testator, and he is sued for it, the Husband and Wife must join in the Action; but where the Money is received after the Marriage, the Husband may sue alone.

(2.) If the Money was received after the Marriage, and by Order or Consent of the Husband, 'tis the same Thing as if the Husband had received it himself, it became Assets in his Hands, and the original Debtor of the Testator is discharged; and if 'tis paid by his Order or Appointment, to a third Person, 'tis a Devastavit in the Executors, because the original Debt to the Testator is paid off, and here is a new Debtor to the Executor, who owed nothing to the Testator.

P.

(3.) In

(3.) In the principal Case, if the Defendant had received this Money, without the Order or Consent of the Husband, in such Case he, by bringing this Action, had affirmed the Receipt, and that it was his Election, and that he consented to make the Defendant his Debtor, so that the original Debtor to the Testator was thereby discharged.

(4.) That tho' the very Bringing an Action against the Defendant shows, that the Plaintiffs consented to make him their Debtor, & omnis rati habitio retrahitur, &c. so as the Plaintiffs might bring this Action in their own Name, yet the bare Bringing the Action did not make it Assets in their Hands till Judgment was obtained; and therefore if the Plaintiffs fail in their Action (as they did in this Case, being Nonsuit) the Matter is set at Large again, and the Plaintiff may sue the original Debtor of the Testator, if he will.

Where an
Executor
shall pay
Costs, where
not.

(5.) That Executors are not excused from paying Costs by the Letter of the Statute, but by a very favourable Construction thereof; as being presumed to have no Knowledge of the Affairs of their Testator, and therefore an Executor shall pay Costs, for not going on to Trial; and where a Cause of Action arises to the Executor himself, for the which he may sue without naming himself Executor, he shall pay Costs; and tho' he names himself Executor, and sues as such, yet if the Case was so, that he might have sued without naming himself Executor, he shall pay Costs; and that in the principal Case, he might have sued without naming himself Executor, because the Action was brought for so much Money received by the Defendant, to his (the Plaintiff's) Use, and by his Order, and therefore shall pay Costs. And per Curiam, An Executor may bring Trover, as Executor, for a Conversion in the Time of his Testator, and shall not pay Costs, but 'tis otherwise, if the Conversion was in his own Time; so where a Judgment is obtained by the Testator, and the Defendant escapes in the Time of the Executor, for which he brings an Action and is Nonsuit, he shall not pay Costs; but 'tis otherwise, if the Judgment and Escape were both in his own Time.

If W. R. is indebted to the Testator, and the Executor Accompts with him, he (the Executor) may bring an Infimus computasset; and this is a new Action, which the Testator himself could not have brought, yet the Plaintiff shall not pay Costs, because the old Debt remains, for 'tis not extinguished by the Accompt, but made certain, so that 'tis not a New Cause of Action; but where an Executor brought Trover and Conversion, and the Defendant came to an Agreement with him, to pay so much for

the Conversion, in such Case the Plaintiff shall pay Costs, because by this new Agreement the original Cause of Action is extinguished.

(6.) The Ch. Just. held, that where a Plaintiff sues as Executor, and could not sue but as such, the Thing for which the Suit is brought is not Assets till Execution sued forth; but where he needs not sue as Executor, 'tis not Assets till Judgment, and then it is, for the original Debtor is then discharged, so that 'tis a Devastavit: This Case is reported in 1 Salk. 207. but not so full and so clear as here, and in the Argument these Cases were cited, Latch. 220. Hutt. 78, 79, 214, 220. 3 Lev. 60, 375. 2 Lev. 185. 1 Vent. 109, 119. Jones 170. Hob. 219, 233, 284. 1 Cro. 29, 36, 175, 229.

Anonymus. Hill. 9 Will. III.

A Motion was made, that a Pauper might pay Costs for not going on to a Trial: Sed per Curiam, he pays no Costs unless upon a Nonsuit, or where the Verdict is found against him, and then he shall pay Costs, or be whipp'd. See Stat. 23 H. 8. cap. 15.

COVENANT.

(1.) IN Covenant, the Plaintiff assigned several Breaches in not repairing, the Defendant pleaded non infregit conventiones, and upon Demurrer to this Plea it was adjudged ill, because not repairing, and non infregit conventiones are two Negatives, upon which Issue cannot be joined, but 'tis good after a Verdict, for the Issue is not immaterial but informal only. 1 Lev. 114,
183. Pitt &
Ruffel.

(2.) Covenant and declares, that W. R. and his Wife levied a Fine of Lands for concessit, to the Plaintiff with Warranty: Per Curiam, an Action of Covenant will lie upon this Warranty as well as Voucher or Warrantia Chartæ. 1 Lev. 301.

(3.) Covenant for Non-payment of Rent, and assigned the Breach, that the Lessee did not pay the Rent at any of the Feast- 1 Lev. 78.
P 2 Days

Days on which it ought to be paid during the Term; this Declaration was held good, tho' general, for it may be true, that no Rent was paid on any of the said Days.

- 1 Lev. 155. (4.) The Plaintiff conveyed an Office to the Defendant, provided, that out of the first Profits he pay the Plaintiff 500 l. adjudged, that an Action of Covenant lies on this Proviso, for 'tis not by Way of Condition or Defeasance, but in Nature of a Covenant to pay the Money.
- 1 Vent. 148. (5.) Covenant to pay W. R. 100 l. he making him an Estate in D. adjudged, that if he tender him a Feoffment, and offer to make Livery and Seisin, &c. he may bring an Action for the Money as if he had actually made a Title.
- 1 Vent. 185. (6.) Lessee for forty Years made an Under-lease to W. R. for five Years, and afterwards made a Lease to L. L. for forty Years, who covenants to repair durante termino præd. 40 Annorum, the Under-Lessee refused to attorn, yet L. L. the Lessee for forty Years must repair, because his Lease is commenced in Point of Computation.
- 1 Vent. 126. (7.) Debt upon a Bond of Covenants, and for Breach, assigned, that the Defendant had broke the Covenants; upon a Demurrer to this Declaration it was held to be ill, because 'tis double, for he ought to have insisted upon one Breach certain.

Copley *versus* Hepworth. Trin. 3 Jac. Rot. 261. B. R.

What are
mutual Co-
venants.

- (8.) **I**N an Action of Covenant upon Articles of Agreement, &c. wherein the Plaintiff covenanted with the Defendant facere dimissionem, to him of a Mill, paying 20 l. Rent per Annum for so many Years, and the Defendant covenanted to pay the Rent during the Term; the Plaintiff brought this Action for Non-payment of Rent, in which he set forth, that the Defendant entered and enjoyed the Mill, &c. The Defendant pleaded, that the Plaintiff did not make any Lease to him; and upon Demurrer to this Plea it was adjudged, that these Articles did not amount to a * Lease, being only a Covenant facere dimissionem; and Holt Ch. Just. held, that the Making the Lease was a Matter precedent, and that the Plaintiff could not be entitled to the Rent till a Lease was made, but Eyres, Dolben, and Gregory Justices contra, because these are mutual Covenants, and equal Remedies are on both Sides; and 'tis alledged that the Defendant entered, but upon the other Point the Defendant had Judgment upon arguing the Demurrer Mich. 2 Will. 3.

* Roll. Ab.
848.
2 Cro. 172.

Hannam *versus* Redman. Mich. 9 Will. III. B. R.

(9.) **P**ER Holt Ch. Just. Where several Lands are charged with a Rent-charge, and the Owner of these Lands makes a Lease thereof, and covenants with the Lessee to save him harmless, &c. and afterwards the Lessee pays the Rent to the Grantee of the Rent-charge, voluntarily and without Compulsion, in such Case he pays it in his own Wrong, and must pay it again to the Lessor; but if he is distrained for the Rent-charge and his Goods taken, this is a Breach of the Covenant, and not before; and the Lessee must not alledge generally, that he was compelled to pay the Rent, but must shew how.

Covenant to save the Lessee harmless from a Rent-charge, if he pay it without Compulsion, he pays it in his own Wrong.

(10.) A Bishop made a Lease, in which the Lessee covenanted to repair, the Bishop died, and his Executors brought an Action for not repairing in the Time of the Bishop, and adjudged well. 2 Vent. 56.

COVENANT to stand
seised. See Uses.

COUN-

COUNTY PALATINE.

Cotton *versus* Johnson. Hill. 2 Will. III. B. R.

¹ Salk. 183.
In Ejectment
for Lands in
Ely, a *Venire
facias* was
prayed to the
next Vill.

(1.) **I**N Ejectment for Lands in the Isle of Ely, after Not guilty pleaded, it was suggested on the Roll, the Privilege of the County Palatine, that no Jury should be returned out of the Isle, and so a *Venire facias* was prayed to R. the next Vill in the County of Cambridge, Et quia videtur Justiciariis hic rationi consonans ei conceditur; it was objected, that the Defendant's Confession should have been entered likewise on the Roll, (viz.) Et quia Defendens hoc non dedicit Ideo ei conceditur, but adjudged, tho' some Precedents are so, yet either Way is well enough; for if the Fact is otherwise, he may bring a Writ of Error, and assign it for Error; then it was objected, that the Entry ought to have been, quod liberi tenentes nec residentes in eadem insula non aggredi debent ad aliquam juratam extra libertatem illam faciend'; for otherwise it doth not appear to be a Privilege annexed to the Inhabitants, but a meer Cognisance in the Bishop; however, the Trial being in the County of Cambridge, of which this is Parcel, the Court held it to be aided by the Statute 16 & 17 Car. 2. cap. 8.

* 1 Vent. 157. (2.) Tho' 'tis commonly said, that * Lancaster is a County Palatine by Act of Parliament, and Chester and Durham by Prescription, yet this must not be intended of a meer Prescription, because a Franchise, quæ se exaltat in Prærogativum Regis, can never be gained by meer Prescription, but must depend on antient Grants of Kings, and Allowances in Eyre as well as by Prescription.

(3.) 'Tis true, Lancaster was erected into a County Palatine, in pleno Parlamento, Anno 50 Ed. 3. and it was granted by the King to his Son John for Life, that it should have jura Regalia, and a King-like Power to pardon Treasons, Outlawries, to make Justices of Peace and Justices of Assize, and all Processes and Indiments were in his Name; but these Royalties are abridged by the Statute 27 H. 8. cap. 24.

(4.) But because Lancaster was erected by Act of Parliament into a County Palatine, therefore Outlary in Lancaster is pleadable in the Courts of Westminster, but Outlary in Chester is not.

(5.) By the Charter of H. 4. confirmed by Parliament, the Possessions of the Duchy of Lancaster are kept separate from the Crown, and are to be in the King as they were before he was King, so as to pass by Liberty or Grant. Plow. 215.
2 Inst. 205.

(6.) There is a Seal for the County Palatine, and another for the Duchy, (i. e.) such Lands as lie out of the County Palatine, and yet are Part of the Duchy; for such there are, and the Dukes of Lancaster held them, but not as Counts Palatine, for they had not Jura Regalia over them. 2 Lutw.
1236.

(7.) 'Tis for this Reason, that the King may make a Corporation by the Seal of the County Palatine, within the County Palatine, for so might the Count Palatine himself, as having Jura Regalia.

(8.) But the King cannot grant or make a Corporation by the Duchy Seal within the Duchy Lands, because 'tis Jus Regale to grant a Corporation, and the Duke of Lancaster qua talis could not do it.

(9.) Any thing natural, and which arises from the Land, and which might be granted, the King may grant under the Duchy Seal, for those Things might be granted by the Duke of Lancaster as he was a Subject; of this Nature are Advowsons, Rents, Wayes, Offices, &c. for these savor of the Land, and might have been granted by the Duke before the Possessions came to the Crown; but 'tis not so of a Fair or Market, for those are Jura Regalia.

(10.) Prohibition was prayed to the Duchy Court at Westminster, for holding Plea of Lands within the County Palatine, when there is a Court in the Duchy for that Purpose, and the Duchy at Westminster is only for Lands out the County Palatine. Et per Curiam, It doth not appear, that they have any legal Authority to act as a Court of Equity, for the Statute of Ed. 4. doth not give them a Court of Equity, but a Court of Revenue; however it was allowed, because of long Continuance and Practice. 2 Lev. 24.

C U S T O M.

(1.) **A**S no Law can oblige a People without their Consent, so wherever they consent and use a certain Rule or Method as a Law, such Rule, &c. gives it the Power of a Law.

(2.) Now this Consent is either *verbis* or *factis* (i. e.) 'tis expressed by Writing or implied by Deeds and Actions; and where a Law is founded on an implied Assent, *rebus & factis*, 'tis either Common Law or Custom.

(3.) If 'tis Universal, then 'tis Common Law, if Particular to this or that Place, then 'tis Custom, and had its Rise in this Manner;

(4.) If When the People found any Act or Rule to be fit and agreeable in its first Instance, it was natural for them to repeat and practice that Rule; and if this continued from Age to Age, and was so practised, then it grew into a Law either local or national, according to the Extent of it.

(5.) And such Customs ought to have four Properties, (1.) It ought to have a reasonable Commencement, for no Usage can make that good, which was not so *ab initio*.

(6.) But a Custom shall not be taken to be unreasonable because 'tis contrary to the Common Law; for the Customs of Gavelkind and Borough English are contrary to the Common Law, and yet they are allowed to be good.

(7.) Neither is a Custom unreasonable for being injurious to private Persons or Interests, so as it tends to the publick and general Advantage of the People; therefore a Custom to undermine Houses in publico incendio, a Custom to turn his Plough on the Headland of another, are good; the one to prevent the Spreading of the Fire, and the other in Favour of Husbandry.

(8.) But where a Custom is injurious to the Publick, or to a great Number of People, and only for the Benefit of some Individual, in such Cases 'tis unreasonable; as for Instance, a Custom, that the Commoners of such a Manor shall not put in their

their Cattle, till the Lord first put in his Beasts, or that the Lord shall distrain, and keep the Distress taken till a Fine or Ransom is paid at his Pleasure; for the Original of such Customs was by Cozt or Usurpation.

(2.) A Custom ought to be certain.

(3.) The Continuance ought to be without Interruption; for Discontinuance destroys a Custom by the same Reason that Continuance made it.

(4.) A Custom must not be against the Privilege of the King.

(9.) Now as to Local Customs it hath been held, that a Custom of a Manor cannot extend beyond that Manor; therefore in Trespass for breaking his Close in D. the Defendant pleaded a Custom within that Manor, for every Tenant to have a Way in the Place where, &c. and it did not appear, that the locus in quo, &c. was within the Manor, this was held naught upon a Demurrer. Sid. 237.

(10.) Trespass for Breaking his Close; the Defendant pleaded, that the Close lay in the Hundred of W. in the said County, called the Kingsfield, and that in the said Place, called the Kingsfield, there is, &c. Et talis consuetudo usitat' in eodem quod bene alicui (omitting the Word licuit) volenti fodere pro plumbo. Et per Curiam, Want of the Word licuit makes all imperfect; but if it had been in, yet this Plea is naught, because he ought to have laid a Positive Usage in Fact, and not Quod bene licuit alicui, &c. besides the Custom is not laid in any Manor, Vill or Parish, and there cannot be a Custom in a particular Parcel of Ground, called the Kingsfield. 2 Lutw. 1317. Moor 123. 3 Cro. 110, 392. 1 Lev. 262.

(11.) To plead Pro eo quod secundum consuetudinem, a Thing is so and so, is naught; for it ought to positively alledged (viz.) quod infra such a Place, talis habetur consuetudo. 2 Lutw. 1188.

(12.) Custom, that the Parson in Consideration of the greater Increase of Tithes, shall keep a Bull and a Boar; this is good, because founded on a Consideration of some Benefit. Moor 35. Cro. Eliz. 203.

(13.) But a Custom in London, that if a Stranger die in one Parish and is buried in another, that he shall pay the same Fees to the Parish where he died, that he doth to the Parish where he is buried, is naught, because he was not bound to come to Church, and to receive the Sacrament in that Parish where buried. Roll. Abr. 559.

D A M A G E S. *See* Judgments 13.

(1.) **W**HERE a Judgment is given for the Plaintiff, and the Defendant brings a Writ of Error, and the first Judgment is affirmed, the Defendant in Error shall have Damages and Costs for the Delay of Execution, and the Trouble he is put to, and this by the Statute 3 H. 7. cap. 10. but 'tis otherwise, if the first Judgment was given for the Defendant, and the Plaintiff brings a Writ of Error, for there is no Delay in the Execution; but this is now altered by the Statute 8 & 9 Will. 3. cap. 11. by which it is enacted, that it shall extend only to Judgments upon Verdicts.

1 Cro. 560.
1 Vent. 133.
3 Lev. 374.

(2.) In all Actions where the Plaintiff hath Damages by Common Law, he hath Costs likewise by the Common Law; and so 'tis in all Actions wherein the Plaintiff hath Damages by Virtue of the Statute of Ed. 6. or any precedent Statute, for in all such Actions the Statute gives him Costs as well as Damages.

(3.) And in any of these Cases, if a subsequent Statute doubles or trebles the Damages, the Costs are so too; as for Instance, in Trespass for a forcible Entry upon the Statute 8 H. 6. or in an Action on the Case upon the Statute 2 H. 4. for suing in the Admiralty for a Batter arising on the Land, or in an Action of Waste, upon the Statute of Gloucester, against Tenant in Dower, or Tenant by Curtesy, for these are Acts of Addition (i. e.) there were Damages at Common Law in these Cases, which these Statutes encrease.

(4.) But in an Action of Waste against Tenant for Life, or in a Quare Impedit, the Plaintiff shall have Damages, but no Costs, because there were no Damages at Common Law, but are given after the Statute 1 Ed. 6. by subsequent Statutes.

(5.) Now in these Statutes of Creation (i. e.) such Statutes which give Damages, where there were none before at Common Law, or before the first of Ed. 6. there is a Diversity, where a Statute gives certain Damages, and where uncertain; for if a Statute of Creation gives uncertain Damages, no Costs can be recovered, but if the Damages are certain, Costs shall be recovered

covered as well as Damages; but this is only to be intended of Private Actions to the Party grieved, and not of Popular Actions, as in Tamquam, Informations, &c.

Cook versus Beale.

(6.) **A**Djudged between these Parties in an Action of Assault, &c. that where the Plaintiff declares of a Wounding by the Word *Maihemavit*, 'tis clear the Damages may be increased, tho' Damages are given by the Jury. Where the Damages may be increased, where not.

(7.) So 'tis where the Plaintiff sets forth a Wound so particular in his Declaration, that by the Description it appears to be a *Maihem*; and so 'tis where the Wound is visible and apparent; and this may be done, whether Damages are given by the Jury upon an Issue joined, or upon a Writ of Inquiry.

(8.) But this Encrease of Damages must be given by the Courts at Westminster upon the View of the Wounding, or upon Affidavits made thereof; and it cannot be done by the Justices of Nisi prius, who, if the Wound is very great, must endorse the Evidence on the *Postea*, and upon such Evidence the Damages will be increased, tho' the Wound was not set forth in the Word *Maihemavit* in the Declaration; and so 'tis without such Endorsement where the Cause was tried before a Judge of that Court where the Motion is made for Encrease of Damages. Dyer 105, 228.

(9.) Trespas in the Palace-Court, the Cause was removed ^{2 Lev. 124.} into B. R. by the Defendant, and the Jury having given 15 s. Damages, the Question was upon the Statute 22 & 23 Car. 2. cap. 9. whether the Plaintiff should have no more Costs than Damages: Et per Curiam, the Cause being removed by the Defendant, the Plaintiff shall have more Costs, but not if it had been removed by the Plaintiff, for so he might be more veracious.

Death of either Party. See *Scire facias* 2.

Oades *versus* Woodward. Hill. 1 Annæ, B. R.

i Salk. Sj.
Where a
Judgment
was entered
after the
Party died.

(1.) **T**HE Case was, one Woodward gave a Warrant of Attorney to confess a Judgment, and died in Hillary Vacation, the Attorney entered the Judgment as of Hillary-Term, but did not bring in the Roll till after the Effoin-Day of Easter-Term, so that now it was a post Terminum Roll; and the Question was, whether it should be received, if it was received, then the Judgment would be of Hillary-Term, which was whilst the Party was alive, and consequently it would be good: But per Holt Ch. Just. this Roll was not admitted to be filed; by the Course of the Court, all the Rolls of Hillary-Term ought to be brought in before the Effoin-Day of Easter-Term, and a post Terminum Roll cannot be received without Leave of the Court, upon Motion made for that Purpose; and such Leave is never granted, but where it appears to the Court that no Body can be prejudiced by it, for 'tis dangerous; and tho' it hath been done, he would never consent that it should be done again, because by this Means the Statute of Frauds, and the Statute for docquetting Judgments would be frustrated, for if the Court should allow the Filing this Roll in Easter-Term as a Judgment in Hillary-Term, when it was not amongst the Rolls of that Term, or the Vacation following, how could Purchasers avoid it, when it was neither docquitted, or to be searched after in that Term, upon either of those Statutes; so the Court would not allow the Filing it.

Woolridge *versus* Clobberie. Mich. 4 Jac. Rot. 15.
B. R.

(2.) **A**N ACTION on the Case was brought against four Defendants, and the Plaintiff had a Verdict and Judgment, (it was for stopping his Watercourse) one of the four Defendants died before the Trial; and afterwards, upon a Writ of Error brought, the * Judgment was held to be erroneous as to him who was dead, and therefore it must be reversed against all the Survivors, for it cannot be reversed in Parcels: The Difference was taken between Actions founded on * Torts and on Contracts, in the first Case, if there are several Defendants, and one die before the Verdict, yet the Action shall stand; so if he die after Verdict, the Plaintiff may suggest the Death of him puis darrein Continuance, and take Judgment against the Survivors, but there needs no Surmise to alter the Distingas or the Venire, for by the Death of one Defendant the Action doth not absolutely abate: 'Tis otherwise in Actions founded upon Contracts, which in their Nature are entire; and therefore in such Cases, if 'tis suggested that one is dead, no * Judgment shall be entered against the Survivors: There is also a Difference between Verdicts at Nisi prius and at Bar; for if after a Verdict at the Nisi prius, one of the Defendants die before Judgment, there, if 'tis entered against all, 'tis erroneous, but 'tis otherwise if entered after a Trial at * Bar, for there the Judgment relates to the Verdict.

Action against four Defendants, one died before the Trial, the Judgment against the rest was reversed.

* Cro. Eliz. 145.
Cro. Car. 426, 509, 514.
Jones 356, 567, 400.

* Com. 186.
Sid. 259.

* Poph. 132.
Roll. 768.

Ellwaies *versus* Lucy.

(3.) **T**HE Plaintiff brought Trespass against four Defendants, they all appeared, and after some Continuances, three of them pleaded, that the other died after the last Continuance; & petunt judicium de Brevi & quod Breve prædicti Cassetur; and upon Demurrer to this Plea it was adjudged ill, because they should have concluded, Et petunt judicium si Curia ulterius procedere vult, for the Writ was actually abated by the Death of the other Defendant.

3 Lev. 120.
Trespass against four Defendants, 3 pleaded, and the other died, the Action is abated.

DEBT.

D E B T.

Ward *versus* Evans. Mich. 2 Annæ.

Mod. Cases
36.
2 Salk. 442.
Taking Pa-
per is no Pay-
ment where
there was a
Debt preced-
ent.

(1.) **T**HIS Case. *ff.* There was a Debt of 50 l. due to the Master, who sent his Servant with the Debtor to receive the Money; they went to a Goldsmith, upon whom the Debtor had a Bill of 100 l. and the Goldsmith endorses 50 l. on that Bill, and gave the Servant a Bill upon another Goldsmith for 50 l. and the next Day that Goldsmith broke, and thereupon the Master resorted to the first Goldsmith, who refusing to pay the Money, an Action was brought against him by the Master, and whether it would lie, or not, was the Question: Et per Holt Ch. Just. the Taking a Note in Writing for Goods sold may amount to a Payment of the Money, because 'tis Part of the original Contract; but Paper is no Payment where there was an original and precedent Debt as in this Case there was, for 'tis intended to be taken upon this Condition, (*viz.*) That the Money be paid in a convenient Time.

Marle *versus* Flake. Trin. 12 Will. III. B. R.

Payment of
Money on a
Bond is a
good Plea
before the
Condition
broken.

(2.) **P**ER Holt Ch. Just. Payment of a Bond with a Condition endorsed is a good Plea before Breach but not after, no more than to an Action of Debt upon a single Bill, for when the Breach is made, the Benefit of the Condition, which is always in Behalf of the Obligor, is gone.

1 Lev. 22.

(3.) Adjudged, that where the Lessor assigned his Rent without the Reversion, that the Assignee (if the Tenant agrees) may maintain an Action of Debt for the Rent, because the Privilege of Contract is transferred.

2 Vent. 129.

(4.) The Lessor made a Lease, reserving 20 l. per Annum to be paid quarterly, Debt may be brought for the last Quarter's Rent, without shewing the other three Quarters were satisfied, for every Quarter's Rent is a distinct Debt, and distinct Actions lie for each Quarter.

D E E D S.

(1.) **T**HE Elder Saxons made Conveyances of their Lands here, without Deed or Writing (viz.) either by the Delivery of a Turfe, of a new Staff, &c. The first Deed concerning Lands was made by Withredus King of Kent, Anno 694. and that, and other subsequent Writings made for such Purposes, were called Chirographs, but in the Time of the Normans, they were called Charters, and afterwards Deeds. Spelm. Rel. S.

Anonymus. Pasch. 9 Will. III.

(2.) **P**ER Holt, Ch. Just. when a Deed is pleaded with a Pro. fert hic in Curia, the very Deed it self is by Intendment of Law immediately in the Possession of the Court, and therefore when Oyer is craved, 'tis of the Court, and not of the Party. By a Pro. fert hic in Curia, the Deed is in Court.

(3.) After Oyer is craved, the Deed is become Parcel of the Record, and the Court must judge upon the whole.

(4.) The Demand of Oyer is a kind of Plea, and may be counterpleaded.

(4.) When a Deed is not in Court no Oyer can be granted ; therefore when Oyer is prayed, 'tis always intended, that the Deed is in Court, and the Words ei legitur in hac verba, &c. are the Act of the Court. Sid. 308.

(6.) In Debt against an Administrator upon a Bond of his Intestate, the Defendant demanded Oyer of the Bond and Condition & ei legitur ; the Condition was for Performance of Covenants in an Indenture made between the Plaintiff and the Intestate ; then the Defendant prayed Oyer of the Indenture mentioned in the Condition, tho' it was not in Court & ei legitur, and then he pleaded, and the Plaintiff demurred, so that the Indenture was not in Court ; it should have been produced by the Defendant, under the Hand and Seal of the Plaintiff, and where it was made, and the Substance thereof, that if it should be misrecited, or a wrong Deed set forth, the Plaintiff might plead Non est factum : Now in this Case he cannot plead that Plea, because 1 Saund. 8, 9.
the

the Defendant hath not alledged, that it was the Plaintiff's Deed, and for that Reason he cannot crave Oyer of it, and get it truly entered, if it should be misrecited. But adjudged, that upon a General Demurrer, it shall be intended to be the true Indenture, and that it was in Court, and that if the Defendant had endeavoured to trick the Plaintiff, he might have complained to the Court.

† Saund. 306.

(7.) In Debt upon Bond conditioned for Performance of Covenants in an Indenture: The Defendant craved Oyer of the Condition, and pleads, that he hath the Indenture in Court, and that there are no Covenants therein to be performed, Et hoc, &c. The Plaintiff prayed Oyer of the Indenture, which was entered in hec verba; and it appearing, that there were several Covenants therein to be performed, he demurred to the Defendant's Plea, and adjudged good; for upon Oyer of the Indenture, 'tis made Part of the Defendant's Plea; so that it appearing judicially to the Court, that he did plead a false Plea, and averred against the Truth of what appeared by the Indenture; therefore the Plaintiff needs not shew any Matter of Fact in his Replication to maintain his Action, but 'tis more proper for him to demur.

2 Lev. 113.
Cro. Car.
399.

Vent. 297.

(8.) Adjudged, that where a Chose in Action is created by a Deed, the Destruction of such Deed is the Destruction of the Duty it self; as in Case of a Bond, Bill, &c. but 'tis not so where an Estate or Interest is created by a Deed.

1 Vent. 9,
210.

(9.) Debt upon Bond; the Defendant pleads, that he delivered it as an Escrow, Et hoc paratus est verificare; and upon a Demurrer to this Plea, it was adjudged ill, because he ought to shew to whom he delivered it, and then to conclude, Et sic non est factum; for this Plea amounts to a special Non est factum, and the Plaintiff cannot reply, that he delivered it as his Deed, and travers, that he delivered it as an Escrow.

Anonymus. Mich. 3 Annæ.

Date of a
Deed either
express or
implied.

PER Holt Ch. Just. A Date of a Deed is either express or implied; the express Date is the very Day and Year, in which the Deed was made, and this is always intended when in Pleading 'tis said, bearing Date; the other is the Implied Date, which is the Delivery.

DEFAULT.

Staple *versus* Heydon. Trin. 2 Anna B. R.

(1.) **T**HIS Case is reported in 1 Salk. and in the Modern Cases, but not in the same Manner as followeth; 1 Salk. 216. Mod. Cases 1. In Trespass for breaking his Wharf and cutting down his Fences; Where the Defendant is out of Court by Default there can be no Repleader. the Defendant pleaded, that one Grey was possessed of this Wharf, and a Timber-yard adjoining, for 90 Years, and had and used a Way from the Timber-yard over this Wharf to the Thames, and being so possessed, did demise the Timber-yard to this Defendant for seven Years; and that the Fence being thereon created to stop his Way, he cut it down, and that he had no other Way to the Thames. The Plaintiff replied, that he (the Defendant) had another Way to the Thames; upon which they were at Issue, and the Inquest was taken at the Nisi prius, by Default of the Defendant; but the Issue, whether he had a Way to the Thames, or not, being immaterial, the Court was moved for a Repleader: It was held, that this was an immaterial Issue; but it had been otherwise, if the Defendant had pleaded, that he had no other Way to the Timber-yard, but that there could be no Repleader, because by this Default the Defendant was out of Court; then it was urged, that the Trespass being not justified by the Defendant, it was confessed, and therefore Judgment ought to be given against him upon his Confession, and not upon the Issue and Verdict; so is 3 Cro. 214. 1 Leon. 68. But per Holt Ch. Just. where the Defendant confesseth a Trespass, and avoids it by such Matter as can never be made good by any Manner of Pleading, there Judgment shall be given against him as upon his own Confession, without any Regard to the Issue, and so is that Case in 3 Cro. But where the Defendant avoids and justifies by such Matter as would have been sufficient, if it had been well pleaded, (which is this very Case) this, if ill pleaded, shall not be taken for a Confession of the Plaintiff's Action; to which Powell Just. agreed, for this was no more than a Nient dedire, and not a plain and express Confession.

DEMURRER.

Anonimus.

Of Special
and General
Demurrers,
and the Reason
of making the Statute
27 Eliz.

(1.) **P**ER Holt Ch. Just. There were Special Demurrers at Common Law, but they were never necessary but in Cases of Duplicity, and therefore they were seldom practised; for as the Law was then taken to be upon a Special Demurrer, the Party could take Advantage of no other Defect in the Pleading, but to that which was specially assigned for Cause of his demurring.

(2.) But upon a General Demurrer he might take Advantage of all Manner of Defects, that of Duplicity only excepted; and there was no Inconvenience in such Practice, for the Pleadings being at Bar viva voce, and the Exceptions taken ore tenus, the Causes of Demurrer were as well known upon a General Demurrer as upon a Special one; therefore after the Reformation, when the Practice of Pleading at Bar altered, the Use of General Demurrers still continued, and thereby this publick Inconveniency followed, that the Parties went on to argue a General Demurrer not knowing what they were to argue, and this was the Occasion of making the Statute 27 Eliz. by which 'tis enacted, that the Causes of Demurrer should be known in all Cases, and this was restorative of the Common Law.

Kiel. 76.
Allen. 18.

3 Cro. 75.

(3.) Demurrer to the Evidence admits the Truth of the Fact, but denies its Effects in Law; and if such Demurrer is at the Assises, it shall be tried and determined in B. R. or in C. B. &c. and if the Demurrer is upon Written Evidence, the Plaintiff must join or waive it; otherwise, if it is upon Oral Evidence.

1 Lev. 76.

(4.) Many Things have been adjudged ill upon a Special Demurrer, which are otherwise upon a General Demurrer; as for Instance; In Trespass, the Defendant pleaded a Descent to him as Heir, and did not say filio & heredi, or how he was Heir, this is naught on a Special Demurrer.

(5.) So in Debt upon a Bond to save harmless the Defendant pleads indampnificatum servavit.

(6.) So petit judiciu' si ab actione instead of petit judiciu' & damna.

DEPARTURE.

Anonymus. Hill. 2 Annæ, B. R.

(1.) **I**N Trespass, Assault and Battery, it was ruled by Holt Ch. Just. that where the Plaintiff laid the Assault to be done on such a Day, and the Defendant in pleading some Special Matter justifies on another Day, so that now by this Pleading the Day is made material, yet the Plaintiff in his Replication may alledge the Assault to be done on another Day, and that this is no Departure; 'tis true, it hath been held otherwise, but the later Opinions are, that the Day is not material, and that the Plaintiff may maintain his Declaration.

Assault laid to be done on such a Day, &c. The Day is not material.

(2.) In Replevin, the Defendant pleads, liberum tenementum, and Damage-feasant there; the Plaintiff in his Replication confesses, that the Defendant was seised in Fee, but made a Lease dated 26 May to W. R. habendum from the Date, for thirty Years; the Defendant rejoined, that the said W. R. regranted to him the said Term for thirty Years, habendum from the 25th Day of May in the same Month: Adjudg'd this is a Departure, for the Day is to be excluded, and then there is a Reversion for one Day left in W. R. the first Lessee, so that the Defendant is Tenant for Years, Reversion for one Day to W. R. Remainder to the Defendant in Fee; now when the Defendant pleaded a Freehold, it must be intended a Freehold in Possession, which he should have maintained in his Rejoinder.

1 Roll. Rep. 388. What is a Departure.

(3.) A Departure, in Latin Decessus, is a Going off to new Matter of Justification; as for Instance, where the Defendant pleads no Award made, and then rejoins, it was not tendered; so where he pleads Non damnificatus, and then rejoins de son tort Demesne, but where in Covenant the Defendant pleads Performance, the Plaintiff replies, he would not attempt; the Defendant rejoins, he was robbed; this was held no Departure.

1 Lev. 85, 127.

(4.) That which is pleaded at Common Law cannot be maintained by Custom, as where the Plaintiff brought an Action of Covenant;

venant; the Defendant pleaded Infancy, and the Plaintiff replied the Custom of London to charge Infants.

¹ Lev. 81.

(5.) But if the Defendant plead a Statute, and the Plaintiff replies, it is repealed or expired, the Defendant may rejoyn, that 'tis revived or continued, as the Case is, and this is no Departure.

D E P U T Y. See Office 8.

Barker *versus* Kett. Pasch. 13 Will. III. B. R.

¹ Salk. 25.
Deputy may
act in his own
Name.

(1.) **T**HIS Case is reported in ¹ Salk. by the Name of Parker *versus* Kett, to which may be added, as then adjudged, (viz.) That a Deputy may act in his own Name as well as in the Name of his Principal; and Combe's Case in the ninth Report, is not contrary; for tho' 'tis there held, that he who acts as an Attorney must Use the Name of his Principal, yet the Judgment in that Case is otherwise.

* 6 Rep.

(2.) That where a Man hath an Interest and an Authority, and doth an Act without reciting his Authority, it may be intended to be done by Vertue of his Interest, as in * Cleer's Case; but where a Man hath an Authority only, and doth an Act which cannot be good but by Vertue of that Authority, it shall be intended to be done in Pursuance and Execution of that Authority, tho' 'tis not recited so to be done.

⁵ Eliz. Dyer.

(3.) Anno 18 H. 7. the King granted the Office of Remembrancer of the Exchequer to one Robert Blague, to exercise by himself or per sufficientem Deputatum, and Anno 3 H. 8. he was made a Baron of the Exchequer quam diu se bene gesserit, and yet he still continued to exercise that Office by Deputy.

Plow. Com.
^{781.}

(4.) A Steward of a Manor cannot make a Deputy without Special Words in his Patent enabling him so to do; because 'tis

an Office of Trust and Knowledge, which are Qualities annexed to his Person.

(5.) Upon a Bill in the Dutchy Court, the Question was, ^{2 Mod. 173.} Whether a Stewardship of a Manor could be granted in Reversion; and adjudged, that it might, because it may be granted in Fee, or for any lesser Estate, and so in Reversion, because it may be granted to be exercised per se, vel sufficientem Deputatum; Sir Robert Howard's Case.

DEVASTAVIT.

(1.) **A**djudged, that Payment of an usurious Bond is a Devastavit, but a Delivery of Goods fraudulently sold by the Testator himself, is not.

(2.) Payment of a Legacy before a contingent Covenant broken is not a Devastavit, but if after 'tis broken, 'tis a Devastavit.

(3.) Payment of a Statute whilst a Writ of Error is depending upon a Judgment precedent to the Statute is not a Devastavit.

(4.) In Equity, the Executor of an Executor is liable as far as he hath Assets, but he is not so at Law; now by the Statute 30 Car. 2. cap. 7. the Executor or Administrator of a wrongful Executor is liable for a Devastavit of the wrongful Executor.

(5.) After Assets found, or Judgment upon a Demurrer, the Sheriff must return Assets or a Devastavit, (i. e.) he shall not return nulla Bona generally, but he may return nulla Bona in the same County.

(6.) An Executor pleaded a Note of 5000 l. which, with Interest, ^{2 Lev. 40.} amounted to 7000 l. and a Judgment thereupon not satisfied, this was adjudged ill; for if Interest did run in the Time of the Executor, it was a Devastavit in him to suffer it, unless there was a Defect of Assets, which shall not be intended, and therefore the Defendant ought to have shewed such Defect, if there was any.

(7) A

2 Lev. 161.
Feme Covert
surviving
her Husband
shall be
charged in a
Devastavit
by him.

(7) A Feme Covert, who was Executrix, survived her Husband, she shall be charged for a Devastavit committed or done by him; so likewise if the Plaintiff had recovered against her Husband whilst living, for a Devastavit during the Coverture, and then the Husband dies, the Widow shall be charged for the Damages, but not for the Costs.

D E V I S E.

1 Vent. 215.
Devise to
W. R. for
Life, Re-
mainder to
his Heir is a
Fee-simple.

(1.) A Djudged, that a Devise to W. R. for Life, Remainder to his Heir, is a Fee-simple, for Hares est nomen collectivum; but if he add, and to the Heirs of such Heir, it is for Life only, for Words of Limitation being added to the Word Heir, it shall be taken as designatio personæ.

1 Vent. 228.
Devise to
W. R. and to
the Issue of
his Body is
an Estate-
tail, if he
hath no Issue
at that Time.

(2.) A Devise to W. R. and to the Issue of his Body, if he have no Issue at that Time, 'tis an Estate-tail, and the Word Issue is a Word of Limitation, for otherwise it would signify nothing; but 'tis otherwise if the said W. R. had Issue at that Time, for then 'tis a joint Devise, or if it be the Remainder to the Issue of the Body of W. R. for then they take a Remainder in præsentia, as Purchasers.

1 Vent. 230.
Devise to
W. R. and
the Heirs
Males of his
Body, is an
Estate in
Tail male.

(3.) A Devise to W. R. and the Heirs Males of his Body, and if he die without Issue, &c. is only an Estate in Tail male, for an Implication of an Estate of Inheritance shall never ride over an express Estate limited before.

1 Vent. 232.
Devise to his
Heir male is
an Estate-
tail.

(4.) A Devise to W. R. for Life, and afterwards to his Heirs male, is an Estate-tail; but it would not be so if the Estate was limited to his Heir male, and the Heirs of the Body of such Heir male.

1 Vent. 225.
To the Issue
of his Body is
an Estate-
tail.

(5.) The Testator had three Sons, and he devised his Lands to his third Son for Life, and after his Death to the Issue of his Body by a second Wife, with Power to make her a Jointure, this is an Estate-tail, for the Word Issue is nomen collectivum, and equivalent to Heir.

(6.) The Testator devised a Moiety of his personal Estate to his Wife, and then several Legacies to others, and the Residue to another. Et per Curiam, the Wife shall have a full Moiety, and then the Debts shall be paid and deducted out of the other Moiety, if that be sufficient; and if there is Money, Bonds and a Lease for Years, the Wife shall have a Moiety of the Lease.

Ch. Rep. 16.
Devise of a
Moiety to
the Wife,
she shall
have a full
Moiety.

(7.) The Husband devised his Goods to be sold for the raising Portions for his Daughters, and that if the Goods were not sufficient for that Purpose, then the same to be raised out of the Rents, Issues and Profits of his Lease Lands; the Question was, whether the Leases might be sold, if the Goods were not sufficient? Et per Finch Lord Chancellor, the Devise of the Annual Profits gives no Power to sell; but a Devise of the Profits doth, and the affirmative Words shall hinder the Power in this Case of a Chattel, as it might in case the Land had been Freehold.

Ch. Rep.
240.
Devise to
raise Por-
tions out of
the Profits,
is a Power to
sell.

(8.) A Writing was made in this Form (viz.) This Indenture made between, &c. whereas, &c. now in Consideration of 5 s. he bargains and sells to the Parties to be disposed in Manner following, All the Rest I give and bequeath, &c. and I make the said Parties my Executors, this was adjudged a good Will.

Ch. Rep.
249.
What shall
be a good
Will, tho' in-
formal.

(9.) The Father settled a Lease, with Reference to his Will, in which he gave 500 l. to each of his Daughters, to be paid at the Age of twenty-one, and if any or all died before that Age, then to others, but devised no Maintenance to them till their Portions became payable. Et per Curiam, a Maintenance cannot be decreed, because of the Devise over.

Ch. Rep. 249.
Devise of
Portions to
be paid at 21,
and if die
before, then
to others,
a Mainte-
nance can-
not be de-
creed, be-
cause of the
Devise over.

Fisher *versus* Nicholls.

(10.) **T**HE Construction of Wills is more favoured in Law to fulfil the Intent of the Testator, than any Deed or Conveyance executed by him in his Life-time.

Antea Copy-
hold 1.

Therefore, where a Man by Deed gives Lands to W. R. and his Assigns for ever, this is only an Estate for Life; but in a Will these very Words make an Estate in Fee.

What makes
a Fee-simple
by Will.

So a Devise to W. R. being his eldest Son, and his Heirs, after the Death of his Wife, this is a good Estate for Life by Implication in the Wife; but 'tis not so in a Deed.

Cro. Car.
366.
Jones 343.

Now per Holt Ch. Just. The Reason of this Diversity is not only, that the Testator is intended to be inops Concilii, but because a Devise is not a Conveyance by the Common Law, but by the Statute; 'tis true, there were Devises before the Statute

Devise is not
a Convey-
ance by Com-
mon Law,
but by Cu-
stom.

of

of H. 7. but those were not by Common Law but by Custom, as in Cases of Burgage Lands; now as Custom enabled Men to dispose their Estates in this Manner, contrary to the Common Law, so it exempted this Kind of Conveyance from the Regularity and Propriety required in other Conveyances; and thus it came to pass, that Wills upon the Statute, in Imitation of those by Custom, gained such favourable Construction.

² Lev. *Bowman v. Milbank.*

Where the Heir shall not be disinherited, because the Will was doubtful.

¹ Lev. 11. Where the Devise is only of an Estate for Life.

(11.) Adjudged, that when the Devise was in those Words, I give all to my Mother, that by these Words the Heir was not disinherited, because 'tis incertain what was intended by that Word All; tho' it was insisted, that it included the whole Estate both Real and Personal, for *qui omne dat nihil excipit*.

(12.) Devise to his eldest Son for Life, and if he die without Issue living at the Time of his Decease, then to his second Son and his Heirs; but if his eldest Son hath Issue living at his Death, then the Fee-simple shall remain to his Right Heirs for ever; adjudged, this is an Estate for Life in the eldest Son, which is not drowned in the Reversion he hath as Heir, and that the Remainder to his Right Heirs is not executed but contingent.

¹ Lev. 135.

(13.) The Wife was Tenant for Life, Remainder to the Right Heirs of the Husband, who devised his Lands to the Heirs of the Body of his Wife, if they attained to the Age of 14 Years, and died without Issue; this is an executory Devise, and no Remainder to the Heirs of the Wife; for tho' she hath an Estate for Life, yet that was not created by the Devise; but this is a new Estate, and not joined to that of the Wife.

¹ Vent. 207.

(14.) Adjudged, That Wills appointing a Guardianship of a Child upon the Statute of Car. 2. cannot be proved in the Ecclesiastical Court; neither can they prove Wills there for Lands, but of Goods and Lands they may.

D E S C E N T.

(1.) **I**n immediate Descents there can be no Impediment, but 1 Vent. 416.
 what arises in the Parties themselves.

(2.) The Grandfather is an Alien or attainted, and hath Issue the Father, who hath Issue a Son, and both Denizens, the Son shall be Heir to the Father, notwithstanding the Disability of the Grandfather; otherwise if the Father had been attainted.

(3.) An Alien hath Issue Two Sons, both Denizens, the one may be Heir to the other, tho' neither of them cou'd be Heir to the Father; for the Descent between the Brothers is immediate, and there is no Disability in them, tho' there is in the Father. 1 Vent. 413.
1 Inst. 87.
contra.

(4.) A Father attainted hath two Sons, the one may be Heir to the other, for the Descent is immediate; and tho' the Father is the medium differens sanguinis, yet he is not the medium differens hæreditatis. 1 Vent. 416,
428.
Co. Lit. 3. a.

(5.) In immediate Descents, a Disability by Attainder or being an Alien, not only in the Parties, but in any intermediate Ancestor, thro' and by whom the Descent is made, is an Impediment, and obstructs the Descent.

(6.) There were three Brothers, all Aliens; the two Youngest were naturalized, and the eldest had Issue, then the third Brother died. Adjudged, that his Land cannot descend to his eldest Brother, or to his Issue, because he was incapable himself, and his Issue cannot come in but by Representation; so they shall descend to the second Brother.

(7.) Per Holt Ch. Just. in his Argument in the Case between * Clements and Sendamore, all the Lands in England were of the * 1 Salk. 245.
 Nature of Gavelkind before the Conquest, and descended to all the Issue equally; but after the Conquest, when Knights Service was introduced, the Descent was restrained to the eldest Son, for the Preservation of the Tenure. Lamb. 167.
Seld. Edm.
184.

But in both Cases, Succession by Right of Representation Seld. de Suc-
cess. cap. 23.
 was allowed, and so it has been in all Nations.

DISCONTINUANCE of ACTION. See Issues joined 9.

Salisbury *versus* Proctor. Hill. 8 Will. III. B. R.

5 Mod. 304.
2 Salk. 648.
Discontinu-
ances are
helped after
Verdict.

(1.) **A**N Action was brought against two Defendants, one joined Issue, and the other demurred; the Issue was tried, and there was a Verdict against that Defendant; so that no Day was to be given to him; but as to the other, Day should be given and Continuances entered till Judgment, but none being entered, a Writ of Error was brought, and these Discontinuances were assigned for Error; for being after Verdict they could not be helped by the Verdict. But per Holt. Ch. Just. Discontinuances are helped as well after the Verdict as before; and so it hath been adjudged, for the Statute saith, Where the Fact is tried, without relating to Discontinuances before more than after a Verdict.

Philer *versus* Boson. Hill. 3 & 4 Will. III. B. R.

Statute of
Jeofailes ex-
tends to In-
feriour
Courts.

(2.) **E**Rror on a Judgment in the Court of Excester; the Error assigned was the Want of a Continuance, for it was *ad proximam Curiam*, which is ill in an Inferior Court; but per Curiam, the Judgment being given upon a Verdict this Discontinuance is aided; for the Statute of Jeofailes extends to Inferior Courts, and must be favourably construed to give a Remedy, and the Words are, any Discontinuance, Miscontinuance or Misconceiving of Process, which are general Words, and applicable to all Courts of Law.

Anonymus. Paſch. 5 Will. III. B. R.

(3.) **I**N Treſpaſs and Battery againſt Husband and Wife, the Original, as recited in the Declaration, was of a Battery only at one Time, but the Declaration it ſelf was of ſeveral Batteries done by them at ſeveral Times, to which ſeveral Batteries the Defendants pleaded; and the Plaintiff replied as to one of them only, upon which they were at Iſſue, and it was found for the Plaintiff: Et per Curiam, the Original not being ſet out by craving Oyer, we will intend it to be Right, but miſrecited at the Top of the Declaration; and the Plaintiff not replying to one of the Batteries, is but a Diſcontinuance, which is helped by the Verdict.

(4.) After a Demurrer argued, the Court will not give Leave to diſcontinue in an Action of a Debt upon a Bond to perform an Award. 1 Lev. 140.

(5.) But 'tis not ſo in an Action of Debt for an Escape. 1 Lev. 191.

(6.) Nor in an Action of Debt upon a Bail-Bond, nor in Debt upon a Bond to accompt, nor in an Aſſumpſit upon an accompt ſtated. 1 Lev. 227.
1 Lev. 295.

(7.) There ſhall be no Diſcontinuance before Judgment in the King's Caſe, and therefore, if after Iſſue joined and tried for Part, it ſhould be moved in Arreſt of Judgment, that there is a Diſcontinuance as to the Part; this may be aided, for the King may either take Iſſue upon it, or enter a Nolle proſequi to help the Diſcontinuance. Hard. 504.

(8.) Miſcontinuance is a Wrong doing, but a Diſcontinuance is not doing a Thing; as per Holt Ch. Juſt. A. ſues the Hundred for the Robbery of B. his Servant, the Hundred imparles, and idem dies dat' eſt præd' B. now after Verdict, the Defendant is ſine die in Court, unleſs 'tis to move in Arreſt of Judgment.

(9.) After a Special Verdict the Court may give Leave to diſcontinue, for 'tis not a compleat Verdict, but this is a Favour. Hill. 5 Will. 3.
Reev. 2. Golden.

(10.) Diſcontinuances are either to the Prejudice of the Heir, or of the Succeſſor, or of the Wife, or of him in Remainder or Reverſion, or of the Jointreſs. Per Stat. 11 H. 7. cap. 20. or againſt the Tenant by the Curteſy, with Warranty by the Statute of Glouceſter, cap. 13.

(11.) A Discontinuance to the Prejudice of the Successor is remedied by the Statutes 1 & 13 Eliz. and 1 Jac. cap. 3.

(12.) A Discontinuance to the Prejudice of the Heir is hindered by the Statute 32 H. 8. by which 'tis enacted, that the Wife or Heir may enter.

(13.) But Discontinuances to the Prejudice of Remaindermen and Reversioners still continue.

(14.) Some Discontinuances displace or devest the Estate only, others not only displace and devest it, but take away the Entry, and this is properly a Discontinuance; and 'tis where he who alieneth hath an Inheritance, either in his own Right or in the Right of another, as Tenant in Tail; as for Instance, where the Husband is seised in Right of his Wife, for they not only devest the Estate, but the Wife or Issue to their Action, by taking away their Entry.

(15.) Some Discontinuances gain a Reversion in Fee determinable, and some an absolute Fee; if Tenant in Tail make a Lease for the Life of the Lessee, this is a Discontinuance of the Estate-tail and the Reversion, and therefore the Tenant in Tail hath gained a tortious Reversion in Fee, but determinable upon the Life of the Lessee.

(16.) For if Tenant in Tail make a Gift in Tail to W. R. if he die without Issue, the Discontinuance is determined; but if he make it in Fee, this is a Discontinuance for ever.

(17.) Tenant for Life, Reversion to W. R. in Tail, who bargained and sold to W. W. in Fee, and then levied a Fine of his Reversion to B in Fee; adjudged, that W. W. had nothing by the Bargain and Sale, but an Estate for the Life of his Bargainor descendible to his Heir as a special Occupant: But the Fine having only barred and extinguished the Estate-tail, and having passed nothing to the Cognisee, the Estate of the Bargainee is become a base Fee, descendible to his Heirs as long as the Bargainor has Heirs of his Body. See Took versus Glascock.

(18.) The Husband covenanted to stand seised to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Heirs Males of their two Bodies, Remainder to his eldest Son W. R. who was born of the first Center; &c. afterwards the Husband and Wife levy a Fine to W. W. in Fee, with Warranty, and die without Issue male, by Reason whereof the Estate

descended on W. R. the eldest Son of the Cognisor: adjudged, that this Fine and Warranty was no Bar, because a Warranty cannot be a Bar to the Estate-tail of W. R. the eldest Son, unless that Estate was discontinued, and it could not be discontinued, unless the Estate-tail to the Cognisor was discontinued and displaced by the Fine and Warranty; and here the Estate-tail to the Husband and Wife was not discontinued, because they were not seized of it at the Time of the Fine levied; for they were not seized in their Demesne as of Fee-tail, but the Husband was Tenant for Life, Remainder to the Wife for Life, Remainder to the Heirs Males of their two Bodies, so that these are distinct Estates which cannot unite, and by Consequence the Estate for Life is not drowned in the Estate-tail. See the Case, Stephens versus Britteridge.

DISSENTERS, &c.

Hilton *versus* Byron. Pasch. 11 Will. III. B. R.

- (1.) **T**HE Plaintiff Hilton, being a Quaker, moved for an Attachment against Byron, offering to take his solemn Affirmation, according to the late Act, that he went in Danger of his Life; but the Motion was denied, unless he would take his Oath in common Form, because this was a criminal Case, and not within the Statute.

Criminal Case not within the Statute, for the Ease of Quakers.

The Queen *versus* Ride. Mich. 3 Annæ, B. R.

- (2.) **A** Popish Recusant convict made his Wife Executrix, and afterwards she was permitted by the Spiritual Court to prove the Will; but a Prohibition was granted, because she is disabled by the general Clause of the Statute Eliz. cap. 4. Par. 22. and not enabled by the proviso.

The Wife and Executrix of a Popish Recusant convict cannot prove his Will.

The

The King versus Larwood.

4 Mod. 269.
1 Salk. 167.

* Cap. 1.
The Subject
cannot be
exempted
from the Of-
fice of Sher-
riff, &c.

* 1 & 23
Eliz.

(3.) **I**nformation against the Defendant for not taking upon him the Office of Sheriff of Norwich: He pleaded the Statute * 13 Car. 2. that he had not qualified himself, for that he had not taken the Sacrament as enjoined by that Statute, according to the Usage of the Church of England, &c. The Attorney-General replied, that he was obliged by Law, and ought to have received the Sacrament, &c. The Defendant rejoined, that he was a Protestant Dissenter, and exempted by the Toleration-Act, which he set forth; and upon a Demurrer to this Rejoinder it was adjudged, that this is a private Act, of which the Court cannot take Notice without Pleading it; that by several other * Statutes all Persons are to observe the Discipline of the Church of England; that the Law took no Notice of Dissenters before this Act of Toleration, which extends only to such Dissenters who take and subscribe the Declaration at the Quarter-Sessions; that the Statute 13 Car. 2. now pleaded by the Defendant, doth not exempt Men from serving in Offices to which they were obliged before that Act was made, but to qualify them to execute it, and that the Subject cannot be exempted from this Office, but by Act of Parliament or a Grant from the King.

DISSEISIN.

1 Lev. 45,
270.

(1.) **T**HE Lessor made a Lease to W. R. for eighty Years, to commence next Michaelmas, if W. W. should so long live, and after the Death of W. W. for thirty-one Years longer: W. R. the Lessee, entered before Michaelmas, and continued the Possession afterwards; the Lessor entered upon him, and then the Lessee assigned over the Term: Et per Curiam, the Entry of W. R. the Lessee before Michaelmas, was a Disseisin to the Lessor and not a Possession by Virtue of the Lease; and therefore the Entry of the Lessor did not disturb the Possession of the Term, for in that respect he is not possessed but only by the Disseisin; which is hereby purged, and by Consequence the Term is well assignable.

(2.) So 'tis, if a Stranger had entered on the Lessee, that would not have turned the Term to a Right, because he was not possessed by Virtue of the Term.

(3.) But if Lessee for Years had staid till Michaelmas-Day, and then had entred, and afterwards the Lessor had entred on him, it would have turned the Term to a Right, because he had a Possession by Virtue of the Term, which being devested he cannot assign in such Case before Entry.

Page *versus* Heyward. Trin: 3 Annæ.

THIS Case is reported in 2 Salk. quod vide, in which it was held per Holt Ch. Just. That a bare Entry on another, without an Expulsion, makes only a Seisin, so that the Law will adjudge him in Possession who hath the Right, and so are the Words to be understood in a Special Verdict.

2 Salk. 570.
Entry without an Expulsion makes only a Seisin.

¶ Intravit & fuit inde seiscitus prout lex postulat; but it will not work a Disseisin or Abatement, without an Expulsion.

D I S T R E S S.

Stanfitt *versus* Hicks. 9 Will. III. C. B.

(1.) **T**HE Case was, there was a Lease made for one Year, and so from Year to Year as long as both Parties pleased, by Virtue whereof the Lessee entered, and was in Possession for two Years and an half, and the Rent being in Arrear the Lessor distrained, and adjudged, that he could not by Law, because by this Agreement there was an Estate for two Years created, and no more; the other was a growing Interest or Estate at Will, which, being a distinct Estate from the first, cannot be subject

Where a Distress was after the End of the Term.

Subject to the Arrears of the first. The Reporter tells us the Law is contrary.

Howell *versus* Bell. Mich. & Hill. 8 Will. III.
B. C.

Where an
Executor
may di-
strain for
Rent in Ar-
rear to the
Testator.

(2.) **I**N Replevin, the Defendant avowed, for that W. R. was seised of the Place where, &c. in Fee, and being so seised he granted a Rent-Charge out thereof to W. W. for Life, that W. W. is dead, and that he (the Defendant) was his Executor, and distrained in the Place where, for so much Rent in Arrear, and due to his Testator in his Life-time; but did not aver, that the Place where, &c. was then in the Seisin of the Grantor of this Rent, or any other Person who claimed by, from or under him; and upon a Demurrer to this Avowry Holt, Ch. Just. held, that the Executor might distrain either on the Grantor or any other Person, who comes in by or thro' him, and if the Plaintiff is not liable to the Distress, 'tis more natural for him to shew it in his Replication, for his own Defence. Besides, the Statute which impowers Men to distrain, is a Remedial Law, and therefore ought to be expounded according to Equity, and extended accordingly, and the Words therein being Executors of Tenants for Life may ex vi Termini include all Tenants for Life.

Anonymus. Mich. 8 Will. III. C. B.

Where Cat-
tle may be
distrained,
tho' not le-
vant and
couchant.

(3.) **I**F Cattle escape by the Default of the Owner, on the Lands of the Lessor, he may distrain them for Rent, tho' not levant and couchant; but if such Escape be thro' the Default of the Lessee, in not repairing the Fences, the Lessor cannot distrain them till they are levant and couchant; for if the Lessor had the Lands in his own Hands, he must repair the Fences, and consequently he must see, that his Lessee doth it, for he is not to take Advantage of his own * Default.

* See the
King v. Lar-
wood.

Where a Di-
stress shall be
made for U-
tensils of
Husbandry.

(4.) Adjudged, that the Rule of the Common Law, which exempts Utensils, Tools, Instruments of Husbandry, &c. from Distress, holds only in Distresses for Rent Arrear, Amerciaments, &c. but doth not extend to Cases where a Distress is given in the Nature of an Execution by any particular Statute, as for Poor Rates, &c.

2 Lutw. 1380.
Where a Di-
stress is well
pleaded.

(5.) Trespass for taking two Sheep; the Defendant justifies for Toll (viz.) Quod cepit & distrinxit the said Sheep for Toll, and the same did carry away, as he lawfully might; it was doubt-

ed, whether this was a good Plea, because he did not say cepit & asportavit nomine districtionis; but it seems clearly to be naught, if he had not set forth before that cepit & distrinxit.

(6.) In Trespas for taking ten Beasts 1 April, and also for taking other twelve more on the said first Day of April: The Defendant pleaded, that the Plaintiff had a Lease granted to him, rendering Rent, and that there was 70 l. Rent in Arrear, and that he (the Defendant) did take the first ten Beasts for 60 l. Parcel of the said 70 l. and the other twelve Beasts afterwards, for 10 l. Residue of the said 70 l. and upon a Demurrer to this Plea, it was adjudged ill; for one cannot abate for two Distresses made for one and the same Rent; it was the Defendant's Fault to distrain too little at first.

2 Lut. 1536.
Where two
Distresses
cannot be
for one Rent.

But the Reporter tells us, that if the Defendant had pleaded, that at the Time of taking the first Distress, there was not sufficient to be taken for the whole Rent, upon the Land, and that the first Distress was but only of such a Value, it had been good.

DISTRIBUTION.

(1.) **A** N Administrator at Common Law was bound to distribute the Surplus of the Intestates Estate; but this was altered by the Statute 21 H. 8. cap. 15. by which he is not compellable, tho' he accepted the Administration upon that Condition; and this again is altered by the Statute 22 & 23 Car. 2. cap. 10. by which he is compellable to make Distribution, yet an Estate per autre Vie is not to be distributed, tho' it be within that Act; as for Instance.

Administra-
tor bound to
make Distri-
bution.

Oldison *versus* Pickering. Mich. 8 Will. III.

(2.) **I**N this Case it was adjudged, that tho' an Estate per autre Vie is made Assets by the Statute 29 Car. 2. yet 'tis not Distributable within the Statute 22 Car. 2. for Distribution of Intestates Estates, because Distribution is a Quality not necessarily included in the Notion of Assets, as Payment of Debts is; and this last Statute is only, that Goods and Chattels

2 Salk. 464.
Estate per
autre Vie, is
not distribu-
table.

shall be distributed ; now an Estate pur autre Vie is not properly Goods or Chattels, but remains a Freehold, tho' 'tis Affected by the first Statute.

Pett versus Pett.

1 Salk. 250.
Administration shall be granted to the Aunt and not Distribution to the Children of the Uncle.

(3.) **A**N Intestate, having neither Father or Mother, Wife or Children, but only a Sister of his Father, and two Daughters of his Father's Brother ; a Motion was made for a Mandamus to the Ordinary to make Distribution, who had granted it to his Father's Sister. Sed per Curiam, by the Statute 22 Car. 2. there shall be no Distribution amongst Collaterals after Brothers and Sisters Children of the Intestate ; for that Statute is a Restraint on the Common Law, and therefore shall not be carried farther than the Letter, and after such Collaterals, it shall go to the next of Kin to the Intestate, which in this Case was to his Father's Sister.

D I V O R C E.

Noy 100.

(1) **A** Divorce a Vinculo matrimonii is a Bar of Dower ; but a Divorce a mensa & Thoro is not, for the Marriage still continues, and therefore the Parties thus divorced, cannot marry again during their joint Lives.

Glan. 44.
Brañ. 92.
18 Ed. 4. 45.

(2.) A Divorce for Adultery was antiently a Vinculo matrimonii, and therefore in the Beginning of the Reign of Queen Eliz. the Opinion of the Church of England was, that after a Divorce for Adultery, the Parties might marry again ; but in Foliam's Case, Anno 44 Eliz. in the Star-Chamber, that Opinion was changed, and Archbishop Bancroft, upon the Advice of Divines, held, that Adultery was only a Cause of Divorce a mensa & thoro.

Cro. Eliz.
853.

(3.) Debt upon Bond against Cecilia Wogan, alias diè' Cecilia, late Wife of John Englebert : The Defendant pleaded, that at the Time of the making this Bond, she was the Wife of John Englebert, who was still living, & sic non est factum. The Plaintiff replied, that the said Cecilia and the aforesaid Englebert were

were divorced, for that he had another Wife: Et per Curiam, the Sentence of Divorce is but declaratory; the Marriage was void, ab initio, and therefore the Woman was always sole, and by Consequence her Bond good.

The King versus The Lord Lee.

(4.) **U**PON the Complaint of the Wife of the ill Usage of the Husband, a Habeas Corpus was directed to him to bring her into Court, who appearing, and several Affidavits being read of the hard and severe Usage, and of her Confinement, and that she was in Danger of her Life; and she herself making Oath of this Matter, the Court bound him with Sureties for his Good Behaviour, but they would not separate and remove her from him.

2 Lev. 138.
Wife not separated from her Husband by hard Usage, but he bound to his Good Behaviour.

D O G S.

(1.) **T**HE Law takes Notice of a Greyhound, a Mastiff, a Spaniel and Tumbrel, for Crover will lie for them; and tho' a Man hath a Property in a Mastiff, yet the Thing is of so base a Nature, that 'tis not * Felony to steal a Mastiff.

1 Cro. 125.
2 Cro. 44.

* 7 Rep. 18.

(2.) Where a Mastiff falls upon another Dog, the Owner of that Dog cannot justify the Killing the Mastiff, * unless there was no other Way to save his Dog; and therefore in Trespass for killing his Mastiff, if the Defendant plead, that the Mastiff fell upon the Dog, and that he killed the Mastiff lest he should worry the Dog, 'tis naught, for, perhaps, he might have saved him otherwise; but if he plead, that he could not take him off, nor part them, nor prevent the Worring of his Dog otherways than by Killing the Mastiff, this is a good Justification: Et per Curiam, the Owner of a Mastiff is not bound to muzzle him, unless he be found to be mischievous.

* 1 Saund. 84.

(3.) Trespass for Killing his Dog, the Defendant justified, for that he was Owner of a Warren, and that the Dog was there several Times killing Conneys, and then was running after them

1 And. 135.
2 Cro. 44.

to kill them : Et per Curiam, this is a good Justification, for 'tis the Usage to kill Cats and Dogs in Warrens.

Dyer 25.

(4.) If a Dog kill a Sheep, not being used so to do, nor by the Encouragement of another ; sed fortuito, the Master is not liable, no, tho' accustomed to kill Sheep, unless the Master did know it.

Chambers *versus* Warkhouse.

3 Lev. 336.
Where a
Man may
have a Pro-
perty in a
Dog.

(5.) **T**Rover de sex Catulis & quatuor Catellis, after a Verdict for the Plaintiff it was objected, that Catulis signified little Whelps, and Catellis Whelps of any Sort, as of Dogs, Foxes, &c. besides, a Man cannot have any Property in Whelps : Sed per Curiam, it shall be intended Whelps of Dogs, and a Man may have a Property in a Dog, for Trespass lies for taking away * Canem Venaticam, and the like Action for killing a † Mastiff.

* Hob. 283.

Dyer 306.

† 2 Cro. 463.

DONATIVE.

The Ordinary hath Power as to the Parson but not to the Place.

(1.) **D**onatives are either by Royal Foundation or by Royal License, or by original Agreement with the Ordinary ; but after 'tis established, the Ordinary hath nothing to do with it, 'tis visitable by the Patron's Commissioners, it must be resigned to the Patron, no Lapse can incur : But per Holt Ch. Just. the Ordinary hath a Power as to the Parson, tho' not to the Place ; for if the Parson marries without a Licence, or commits any Misdemeanor, the Ordinary may punish him in that respect, but he cannot regulate the Seats in the Church ; and if the Patron will not present, the Ordinary may compel him ; the Parson is exempted from Attendance at Visitations.

Yel. 61.

A Presentation will not destroy a Donative.

* 2 Salk. 541.

(2.) It has been formerly held, that a Donative may be discontinued by the Presentation of the very Patron ; but in * Ladd and Widdow's Case it was adjudged by Holt Ch. Just. and the Court, that tho' a Presentation might destroy an Impropriation, it could not destroy a Donative, because the Creation thereof

was by Letters Patents, by which the Land was settled to that Parson and his Successors, and he to come in by Donation: Et per Jones Just. Institution to Churches was not a Temporal but a Papal Institution, which was not received in some Places in England; and where it was not received they went on in their old Way and Method, and are called Donatives.

(3.) The Incumbent of a Donative was cited into the Spiritual Court to take a License from the Bishop to preach; and the Pretence was, that it was a Chapel, and that the Parson was stipendiary: Et per Curiam, If 'tis a Donative, and the Bishop will visit, a Prohibition shall be granted.

1 Mod. 90.
Bishop not
to visit a Do-
native.

DOUBLE PLEA.

Lamplugh *versus* Shortridge. Pasch. 13 Will. III. B.R.

There is a short Note of this Case in 1 Salk. but the Case was thus: It was a Writ of Error upon a Judgment in the Common Pleas in an Action of Covenant, and the Error assigned was for Duplicity, (viz.) by Pleading, that by such a Deed he released and confirmed, which is double, and so is he * granted: Et per Holt Ch. Just. where it appears, that the Conveyance pleaded cannot enure by Way of Release and Confirmation, there to plead, that by that Conveyance relaxavit and confirmavit is double, because the Deed cannot enure to both Purposes, as a Bargain and Sale, or a Feoffment, but where the same Deed may enure to both Purposes, as a Lease and Release doth, there 'tis not double.

1 Salk. 219.
Where a
Plea is dou-
ble, where
not.

* 1 Saund. 78.
2 Saund. 97.
Sid. 86.
1 Vent. 109.

Gaile versus Betts.

f Mod. 227.
Where a
Plea is not
double.

DEBT upon Bond, the Defendant craved Oyer of the Condition, which was to pay 40 l. so long as the Defendant should enjoy such an Office, by quarterly Payments every Year; then he pleads, that the Office was granted to three for their Lives, and that he enjoyed it as long as they lived, and so long he paid the said Rent quarterly: The Plaintiff replied, that he (the Defendant) enjoyed the Office longer, and that he had not paid the Money by quarterly Payments; and upon Demurrer to the Replication it was objected, that it was double: Sed per Curiam, it is not, for the Defendant cannot in his Rejoinder tender an Issue upon Payment of the Money, because that would be a Departure from his Plea.

Ecclesiastical Things and Persons.

(1.) **E**cclesiastical Courts are either immediately derived from the Crown, as a Court of Commissioners, for by the Common Law the King may grant a Commission to hear and determine Ecclesiastical Causes and Offences, according to the Ecclesiastical Laws, but not to use any temporal Punishment, as Fine and Imprisonment without the Help of an Act of Parliament.

(2.) Or such Courts are not derived immediately from the Crown, and thus the Law hath annexed to certain Officers an Ecclesiastical Jurisdiction as incident to their Office, as in the Case of a Bishop, who is *Judex Ordinarius* within his Diocese; and so of an Archdeacon; and tho' the Process runs in the Name of the Bishop, yet the Authority and Jurisdiction is from the Crown, like the Process of Counties Palatine, which are in the Name of the Count; yet 'tis not to be doubted but the Palatine Jurisdiction was originally from the Crown; and therefore the King hath a superintendent Power over these Courts, as he is *Custos utriusq; Tabulæ*.

I

(3.) Now

(3.) Now as to Causes determined in these Courts it hath been held, that Matrimonial and Testamentary Cases were antiently determined in the Temporal Courts, for they are not in their Nature Spiritual; that the Proceedings in these Courts are either between Party and Party, or ex Officio, as publick Prosecutions, &c. but these cannot be without a Presentment, and the Party Presenting must be upon Oath, unless it be a publick Person, as a Parson, Vicar, &c.

(4.) And none but those in Orders can exercise Ecclesiastical Jurisdiction in these Courts by the Canon Law; but now by the Statute 37 H. 8. Doctors at Law may; and in such Cases the Chancellor of the Bishop, who is usually a Doctor of Law, is Judge, and therefore the Bishop himself may sue before him, as the King doth before his Judges, in his own Courts.

Hob. 78.
1 Vent. 3.

(5.) By the Usage in England generally the Archbishop is Guardian of the Spiritualties, sede Vacante, in his Suffragan Dioceses; but of Common Right, and consequently where such Usage hath not prevailed, as to all Matters of Jurisdiction, except Ordination, the Dean and Chapter are Guardians of the Spiritualties, and in Cases of Ordination they call in the Aid of the next neighbouring Bishop.

Dean and
Chapter.
2 Vent. 225.

(6.) A Dean cannot make a Proxy to Charge the Possessions of the Church, who is not of the Chapter; but he and the major Part of the Chapter make a Corporation, and their Acts are good and binding, without the Consent of the Rest.

(7.) But a Dean and Chapter cannot act, grant or confirm, unless they are capitulariter congregati & semel in certo loco, which may be in any Place as well as in the Chapter-house; for what they do at several Times, and in several Places, may be factum singulorum, but cannot be the Act of the Corporation.

(8.) Præcentors of old Foundations are within the enabling Clause of the Statute of H. 8. but Leases made by the Chanters of Paul's must be confirmed, for they are minoris Ordinis, (i. e.) meer Singing-men, and not properly Chanters.

Chanter and
Præcentor.
1 Lev. 113.

The Churchwardens of St. Bartholomew's Case.
Mich. 12 Will. III.

ON E Fishburne left 25 l. per Annum, for the Maintenance of a Weekly Lecture, and Lecturer to be chosen by the Parishioners, and to preach on what Day of the Week they should like best. The Parishioners fixed on Thursday, and chose a Lecturer every Year; and now one Turton being Lecturer, and the Parishioners having chosen one Rainer, he was opposed by Turton, who would not submit to their Choice, whereupon the Churchwardens shut Turton out of the Church; but the Bishop of London determined in Favor of Turton, and granted an Inhibition and Monition, &c. Sed per Holt Ch. Just. a Prohibition was granted to try the Right; for no Man can be a Lecturer without a Licence from the Bishop or Archbishop; but their Power is only as to the Fitness of the Person; but not as to the Right.

Error of Judgments in Superior Courts.

Lynch versus Coot.

Where the Defendant in Error may bring a *Scire facias quare Executionem non haberet.*

(1.) **I**N this Case it was held by Holt Ch. Just. that if the Plaintiff in Error lie still after a Writ of Error brought, this is no Discontinuance of the Writ; but that the Defendant in Error hath no other Way but to bring a *Scire facias* against him, to shew Cause *quare executionem non haberet*; and it will be no Plea for the Plaintiff in Error to plead, that there is a Writ of Error depending, but he must assign his Errors forthwith, after such *Scire facias* brought; and in this Case there is this Difference (*viz.*) If the *Scire facias* is entered on the same

Roll

Error of Judgments in Superior Courts. 145

Roll with the Writ of Error, then he may assign Errors without a Scire facias ad audiendum Errores, otherwise not.

Finch *versus* Renew. Mich. 12 Will. III. B. R.

(2.) **I**N Partition, the Judgment was, Quod fiat Partitio; but before the final Judgment was given, a Writ of Error was brought, and it was held, that the Record was not * removed for that Cause, whereupon the Writ of Error was quashed.

Where the Record is not removed.

* Because the Writ of Error comes

too soon, it will not lie till after the Final Judgment (*viz.*) *Quod Partitio facta sit firma.* 2 Bulst. 104, 114. Moor 643. Cro. Eliz. 635. 11 Rep. 38. Stiles 292.

Lampton *versus* Collingwood. Mich. 6 Will. III.

(3.) **I**N a Writ of Error brought by the Bail, it was assigned for Error in a Writ of Error, coram vobis residen' in B. R. that there was no Capias but only a Scire facias against the Principal; but it was disallowed, for this is an Error in Fact, but no Error in the Court.

4 Mod. 314.

1 Salk. 262.

No Capias

against the

Principal is

Error in

Fact.

Prinn *versus* Edwards. Trin. 7 Will. III. B. R.

(4.) **U**PON a Judgment; the Defendant pleaded a Writ of Error depending in the Exchequer Chamber, and so prayed, that Eat inde sine die quousq; adjudged an ill Plea, because no Returnings lies in this Case, as it doth in Excommencement, and other Cases.

Writ of Error depending, no good Plea.

Badger *versus* Loyd. Mich. 1 Annæ B. R.

(5.) **I**N this Case it was said, per Holt Ch. Just. that it was adjudged, that pending a Writ of Error, the Plaintiff in the Original Action may enter if he can; for tho' this Writ forecloses the Court, and ties up their Hands, yet it doth not alter the Right of the Parties.

Where the Plaintiff may enter tho' the Writ of Error is depending.

Knoll's Case.

(6.) **P**ER Holt Ch. Just. 'Tis beneath the Dignity of the House of Peers (that being the Supreme Judicature) to try Matters of Fact; and for that Reason Errors in Fact, of any

Errors in Fact must be redressed in B. R. and not in Parliament.

any Judgments in B. R. must of Necessity be redressed there, and not in Parliament.

Anonymus.

Where a Writ of Error is brought and no Record certified, &c. the Defendant may have a Writ *De Executione judicii*.

(7.) **W**here a Writ of Error is brought, and no Record certified at the Day of the Return of the Writ, the Defendant in Error taking a Certificate of this Matter from the proper Officer of the Court, where the Writ is returnable, he may take out a Writ *De executione judicii* of Course, and the Party cannot hinder Execution thereupon, without he brings a new Writ of Error.

Ball *versus* Richards.

1 Vent. 165. Where all must join in a Writ of Error.

(8.) **E**rror of a Judgment in Assumpsit against several Defendants, and the Writ concluded *ad damnum ipsorum*, which must be against all, when it appeared by the Record, that the Judgment was against three, and that all the rest were acquitted; Per Curiam, yet the Writ of Error is well brought, for all must join in the Writ, which is only a Commission to examine Errors; and *ad damnum ipsorum* may be intended only of those who were found guilty, viz. that they were damnified by this Judgment.

E R R O R.

Evans *versus* Roberts. Mich. 2. Annæ B. R.

Mod. Cases 61. An Inferior Court held, *secundum legem mercatoriam juxta consuetudinem Civitatis*, good.

(1.) **E**rror of a Judgment in the Court at Bristol, the Error assigned was, that the Action there was said to be in a Court held before the Sheriffs and Bailiffs of Bristol, *secundum legem mercatoriam juxta consuetudinem Civitatis prædictæ*; a tempore cujus contrarium, &c. whereas per *legem mercatoriam* ought to be before the Mayor of the Staple; but adjudged well enough,

enough, because it was *juxta consuetudinem Civitatis*, like the Case of the Court of * Piepowders: Then it was objected, that the Writ of Error was directed to the Sheriffs to remove *loquelam coram vobis residen'*, and the Record removed was Loquela, before their Predecessors, Sheriffs: Et per Curiam, where a Fi. Fa. comes to a Sheriff, and he goes out of his Office before 'tis executed, his Successors may execute that Writ, because the Writ is general, and not directed to any particular Sheriff by Name; but 'tis otherwise if it was directed to a Sheriff by Name; a Writ of Error to the Court of Common Pleas is always directed to the Chief Justice of that Court by Name; and there must be no Variance in such Case, but in the principal Case it was held well enough.

* 1 Cro. 46.
Saund. 87,
311.

(2.) Adjudged, that upon a Judgment in B. R. a Writ of Error lies, either in Parliament or in the Exchequer-Chamber at the Election of the Party; but upon a Judgment in the Exchequer-Court, a Writ of Error will not lie in Parliament.

On a Judgment in B. R. a Writ of Error will lie, either in Parliament or in the Exchequer-Chamber.

(3.) The Defendant was indicted in B. R. and found guilty, and he brought a Writ of Error in the same Court, and assigned Error in Law: Et per Curiam, if Judgment is given in B. R. in Civil Actions, a Writ of Error will not lie in the same Court, but only for Errors in Fact triable by a Jury; but upon a Judgment in criminal Cases, Error will lie in B. R. whether the Error be in Fact or Law; but it lies also in Parliament.

A Writ of Error in B. R. will not lie on a Judgment given in that Court for Error in Law, but for Error in Fact in Civil

Cases, but 'tis otherwise in criminal

Cases.

(4.) Adjudged, that where Matter of Fact is insufficiently alleged, in *nullo est erratum* is a Demurrer; so it is if Matter of Fact is alleged against the Record.

Vent. 252.
Where in *nullo est Erratum* is a Demurrer.

(5.) But if Matter of Fact is well set forth with Matter of Law, it is a Demurrer as to the Doubtfulness, but that must be specially assigned, or otherwise in *nullo est erratum* pleaded, the Matter of Fact will be confessed, and the Matter in Law referred to the Judgment of the Court.

Where Matter of Fact is well set forth with Matter of Law.

(6.) Where the first Judgment is upon an *in simul computasset*, or upon an Award, and a Writ of Error is brought; there shall be no Bail within the Statute 3 Jac. 1. cap. 8. because these are not Cases within the Words of that Statute, (*viz.*) Actions founded on Bills or Obligations for Payment of Money.

Bail, where it shall not be on a Writ of Error.

(7.) But if the first Judgment was in an Action on a Bond for Payment of Money, as W. R. should declare was due to him (the Plaintiff) upon account, there he must find Bail on a Writ

of Error brought on a Judgment in such Action; because, tho' this Writ is de jure, yet being generally brought for Delay, the Statute shall be * favourably expounded, and this was an Obligation for Payment of Money; 'tis true, 'tis incertain at first as to the Sum, but reduced to a Certainty before the Action brought. Lev. Mich. 15 Car. 2. Dean and Chapter of St. Paul's versus Capell.

Anonymus.

Where an inferior Court proceeds different from the Courts of Common Law. (8.) **P**ER Holt Ch. Just. In Courts newly constituted, and which are impowered to proceed in a Method different from the Courts of Common Law, their Judgment is not subject to a Writ of Error; but yet B. R. may examine them by Certiorari or Mandamus.

B. R. may examine their Judgments by *Certiorari*, but not by Writ of Error.

1 Roll. Rep. 264. (9.) Where a Judgment in C. B. is affirmed upon a Writ of Error in B. R. and afterwards a Scire facias is brought on that Judgment, and the Plaintiff obtains Judgment thereon; no Writ of Error lies in the Exchequer-Chamber, because the Record was not in B. R. by Bill, as the Statute requires, but by Writ of Error.

E S C A P E.

Sir William Moor's Case. Hill. 2 Annæ, B. R.

Mod. Cases 95. (1.) **A** Prisoner escaped, and was retaken upon a Sunday, by Vertue of a Judge's Warrant, usually called an Escape-Warrant, by Vertue of the Statute 1 Annæ; and it was now moved that he might be discharged, for the Taking him up on a Sunday is within the Statute of * Car. 2. which is very true, if this had been a Taking upon an Original Process, but Person upon an Escape-Warrant, tho' on a Sunday, is not within the Statute.

'tis a Retaking, in the Nature of a fresh Pursuit, and the Marshal might retake a Man upon a fresh Pursuit, with, or without a Warrant; and such a Retaking, tho' upon a Sunday, is not within the Statute; and if so, he may be retaken by an Escape-Warrant upon a Sunday, for the Words of the late Act are general, without any Limitation as to Time; and the Defendant having done a wrongful Act, ought not to be suffered to take Advantage of it. Nota, 'Tis held otherwise in C. B. and the Barons were divided in the Exchequer.

Williams *versus* Cray. Pasch. 7 Will. III. B. R.

- (2.) **A**N Executor brought an Action on the Case against a Sheriff, for a false Return of a Fieri facias delivered to him by the Testator; after a Verdict for the Plaintiff it was objected in Arrest of Judgment, that this Action would not lie, because it was only a personal Tort done to the Testator, which moritur cum persona: Et per Curiam, an Executor cannot have an Action for an Escape upon mesne Process, because that is merely personal, but he may for an Escape upon a Capias ad satisfaciend', or for a false Return of a Fieri facias, and this by the Equity of the Statute 4 Ed. 3. because the Right being determined after Judgment, the Tort is more than personal.

4 Mod. 403.
1 Salk. 12.
Executor brought an Action for a false Return of a *Fieri facias*. brought by his Testator, and good.
1 Roll. Ab. 913. a.
2 Cro. 247.

Rich *versus* Doughty. Pasch. 3 Annæ, B. R.

- (3.) **T**HE Defendant escaped out of Prison, and was retaken by Vertue of an Escape-Warrant upon the Statute 5 Annæ, by a Rabble, without any Officer, as the Statute directs, and was by them brought to the Sheriff, who detained him by Vertue of that Warrant, and upon an Habeas Corpus brought, the Sheriff returned, that Doughty was brought to him by W. R. and others, to him unknown, by Vertue of a Warrant, &c. and that he (the Sheriff) detained him in Custody juxta exigentiam Brevis: Et per Holt Ch. Just. this was adjudged an insufficient Return; 'tis true, the Warrant was good, but being illegally executed, the Sheriff ought not to detain him, for he shall not graft a legal Imprisonment upon an illegal one; he ought to receive the Prisoner from no Person but an Officer, or from one under that Denomination.

Mod. Cases 154.
Where the Defendant was wrong taken by an Escape-Warrant.
* 5 Annæ, cap. 5.

Tilden *versus* Palfriman. Mich. 2 Annæ, B. R.

1 Salk. 213, (4.) **T**here is a short Note of this Case in 1 Salk. 213. and 345. the same again, and in the same Words fo. 345. but Where a Man is actually in Custody, the Entry of an Action in the Marshal's Book is a good Commencement of the Action. the Case was thus: W. R. being indebted to the Plaintiff upon Bond for 100 l. was arrested, and afterwards being in the Custody of the Marshal, he escaped, and being retaken upon an Escape-Warrant, he was committed to Newgate, and having compounded the Debt for 30 l. paid to the Plaintiff, he was discharged from that Action by the Plaintiff, and set at Liberty; afterwards H. H. another Creditor finding him at large, arrested him in another Action, and so he was brought to the Marshal again, who suffers him to escape the second Time, and afterwards H. H. entered an Action against him in the Marshal's Book, by Remanet in Custodia: Et per Curiam, where a Man is actually in Custody, the Entry of an Action in the Marshal's Book may be a good Commencement of such Action against the Party, because when he is in Custody there is no serving of Process upon him; but 'tis otherwise where he is at large, as he was in this Case, tho' it was by Escape, because there you have the Advantage of Process against him; but it was not resolved how long the Marshal shall keep him without a Declaration delivered or Bail filed.

Jones 144.
Where fresh Pursuit and Retaking is a good Plea, and where not.

(5.) Case, &c. in which the Plaintiff declared, that W. W. was in Execution upon a Judgment, and that the Defendant suffered him to escape (viz. at D. in Com. H.) the Defendant confessed the Judgment, and that the said W. W. was in Execution, and that he escaped from him at S. in the County of M. and that he made fresh Suit after him, ante exhibitionem billæ præd. and retook him: Et per Curiam, if the Gaoler retakes a Person escaping before any Action brought, he is excused, but 'tis not so if the Action was brought before the Retaking; for he having given the Plaintiff a just Cause of Action, and that being well commenced, shall not be defeated by any subsequent Matter: 'Tis like the Case of an Action of Waste, if the Defendant plead he repaired before the Action brought, 'tis a good Plea, but not afterwards.

ESTOPPEL.

Trevivian *versus* Lawrence. Pasch. 3 Annæ then
argued.

(1.) **S**Cire facias brought by an Administrator on a Judgment in Trinity-Term, &c. (whereas the Judgment was of Michaelmas-Term) All the Certenants, except one, appeared, and pleaded Nil tiel Record, and Judgment was had against them upon this Plea to that Scire facias, and Execution awarded, and thereupon the Plaintiff sued out an Elegit and Extent; and now upon an Ejectment brought at the Trial, it was discovered, that there was no such Judgment as recited in the Scire facias, for that was a Judgment in Trinity-Term, whereas the Judgment was of Michaelmas-Term following; thereupon the Jury found all this Matter Specially. And now it was argued, that there being no such Judgment as that recited in the Scire facias, for that was a Judgment of Trinity-Term, whereas the Judgment given in Evidence was of Michaelmas-Term; this must be a Failure of the Record, which is very true. But per Holt Ch. Just. the Scire facias being returned, and the Defendants having appeared, and pleaded to it Nil tiel Record, and Judgment being given, Quod habetur tale Recordum, 'tis now too late to make this Objection; for the Party is so estopped, that he can never aver against it in the Point tried; even the Issue in Tail cannot falsify in a Point tried: And as to Estoppels, the Ch. Justice held, that an Estoppel in Pleading doth not bind the Jury, unless it works upon the Interest of the Land. That where a Plaintiff declares upon a Demise (which really was by Indenture) and the Defendant pleads, Nihil habuit in Tenementis; if the Plaintiff take Issue upon that Plea, the Jury, notwithstanding the Indenture, may find that the Lessor had nothing in the Tenements tempore dimissionis, and give a Verdict for the Defendant; but, if instead of Nihil habuit in Tenementis, the Defendant had pleaded Nil debet and Issue thereupon, if the Defendant give in Evidence, that the Plaintiff Nil habuit in Tenementis, he (the Plaintiff) may in such Case take Advantage of his Indenture, by Way of Estoppel, because he could not have that Advantage

1 Salk. 276.
Where the
Party cannot
aver against a
Point tried.

vantage of it in Pleading, as he might in the other Case; so likewise, if a Mortgagee brings an Ejectment against the Mortgagor, and he pleads Not guilty, the Mortgagor shall never be allowed to give in Evidence a precedent Mortgage, he being estopped as to that Matter. Judgment for the Plaintiff.

Pleddall *versus* Freak. Pasch. 8 Will. III.

Where a Demurrer to a Misnomer is not good.

(2.) **D**E B T upon Bond against William Freak; the Defendant pleaded his Name is Walter; the Plaintiff demurred, supposing that the Defendant was estopped by the Record, to say his Name was Walter; but Judgment was given Quod Billa cassetur; for the Plaintiff should have pleaded it.

Holman *versus* Hore.

1 Salk. 275.
Where an Estoppel is conclusive.

(3.) **T**HIS Case is reported in 1 Salk. by the Name of Gilman *versus* Hore, to which may be added (viz.) that some Estoppels are absolutely conclusive, and some by Conclusion give an Interest. The Lessor made a Lease to W. R. for twenty Years, and about a Year afterwards he made another Lease to W. W. for twenty Years; now if there was an Attornment to this second Lease, then it amounts to a Grant of the Reversion of the Lessor; but if no Attornment, then 'tis a Lease by Estoppel: So where a Man makes a Lease to B. for twenty Years, and about a Year afterwards makes another Lease to C. for twenty Years, this is a Lease by Estoppel, and the Rent is payable for the whole Term; but if he enter upon the first Lessee, and then make a Lease to C. who is turned out by B. 'tis no Lease by Estoppel, but only a future Interest for the last Year.

EVIDENCE. *See* Prohibition. 4.

(1.) **I**N Ejectment, the Plaintiff gave in Evidence a Counter-
part of an old Lease, which he found amongst the Writings of his Grandfather's Title, but there were no Witnesses to this Lease, yet it was allowed good Evidence; for the Deeds about that Time (which was in the Reign of Queen Eliz.) were often without any Witnesses.

1 Lev. 25.
Where a
Counterpart
of an old
Lease, with-
out Witness,
was allowed
as Evidence.

(2.) The Plaintiff could not produce any Letters of Administration, yet to prove himself Administrator he produced the Book of the Spiritual Court, wherein there was an Order entered, that Administration shall be granted to him, and this was allowed to be good Evidence.

1 Lev. 25,
101.
An Order,
that Admini-
stration
should be
granted, was
read as Evi-
dence.

(3.) Upon an Issue joined whether Executor or not, the Plaintiff, to prove himself Executor, produced the Probate of the Will; the Defendant may plead, that the Seal was forged, or that there was a Repeal, or that the Testator had Bona notabilia, but he cannot give in Evidence, that this was not his Will, or that another is Executor, or that the Testator was non Compos; because the Ordinary is Judge of these Things, and his Acts are conclusive, and the Party is estopped to falsify them, as he would do, if this should be admitted to be Evidence.

1 Lev. 235.
Probate of a
Will given
in Evidence,
to prove the
Plaintiff
Executor.

Anonymous. Hill. 8 Will. III. B. C.

(4.) Adjudged, that upon Plene administravit pleaded, the Defendant cannot give in Evidence Payment of Judgments, &c. since the Issue joined, nor since the Writ purchased, because the Issue is, whether Plene Administravit at that Time; but tho' he cannot give such Payment in Evidence, yet he may plead it.

Anonymus. Hill. 8. Will. III. B. R.

(5) **R**uled per Holt Ch. Just. that upon Non Assumpsit pleaded, the Defendant cannot give the Statute of Limitations in Evidence, because the Issue is joined in the Præter-Tense (viz.) upon what was done, and the Evidence only proves the Effect thereof to be now avoided; but upon Nil debet, the Statute may be given in Evidence, for it proves, there is nothing now owing according to that Issue.

Lynch *versus* Clerke.

Where a Copy of a Fine or Recovery shall be Evidence.

(6.) **P**ER Holt Ch. Just. The Substance of a Deed cannot be proved, but by the Deed itself, unless 'tis burnt, or lost, or in the Possession of the Plaintiff himself; and if so, then this Matter, as it happens, must be sworn, and that the Deed was executed; and in this Case he said, that a Copy of a Fine or Recovery, is good Evidence, so as it be sworn to be a true Copy and examined; so likewise an old Deed is good Evidence, without any Witness to swear that it was executed: That wherever an Original is of a publick Nature, and would be Evidence, if produced, an immediate sworn Copy thereof will be Evidence, as the Copy of a Bargain and Sale, or of a Deed enrolled, of a Church Register, &c. but where an Original is of a private Nature, a Copy is not Evidence, unless the Original is lost or burnt: He likewise said, that if the Plaintiff will read the Defendant's Answer in Chancery against him in Evidence, the Defendant may likewise take Advantage thereof, for all is Evidence, or none.

Hoe *versus* Nelthrope. Hill. 8 Will. III. B. R.

Where a Copy of a Probate of a Will is Evidence.

(7.) **I**N this Case it was held per Holt Ch. Just. that the Copy of a Probate of a Will is good Evidence, where the Will itself is of Chattels, for there the Probate is an Original taken by Authority, and of a publick Nature; otherwise, where the Will is of Things in the Reality, because in such Case the Ecclesiastical Courts have no Authority to take Probates, therefore such Probate is but a Copy, and a Copy of it is no more than a Copy of a Copy.

Man versus Cary. Pasch. 9 Will. III.

- (8.) **T**HE Question being proposed in this Case to the Justices of the Common Pleas, whether the Copy of a Bank-Bill remaining upon the File in the Bank of England, was good Evidence, or not: They all agreed that it was, and that it was like the Copy of an Enrollment of a Parish-Register, the Bank being a publick Body established by Act of Parliament for publick Purposes.

Copy of a Bank-Bill upon the File in the Bank of England is Evidence.

Anonymus.

- (9.) **P**ER Holt Ch. Just. where a Person is convicted of Perjury upon the Statute, and afterwards pardoned, yet he cannot be a Witness, for the Punishment is Part of the Judgment appointed by the Statute; but 'tis otherwise if the Conviction was at Common Law.

Convicted of Perjury, tho' pardoned, cannot be a Witness.

Thruston versus Slatford. Mich. 12 Will. III.

- (10.) **I**N this Case it was held, that a Bill of Exceptions would lie at a Trial at Bar, as well as at the Nisi prius, for the Words of the Statute are, that the Justices shall sign it, which Word Justices, being in the plural Number, cannot be well understood of any other Justices than those of the Courts at Westminster: And per Holt Ch. Just. where a Judge admits that for Evidence which is not Evidence, there the Party must not demur, for if he doth, he admits the Evidence to be good, but denieth the Effects of it, and therefore in such Case he must bring his Bill of Exceptions; and so it is if the Judge will not admit that for Evidence which is Evidence.

1 Salk. 284. Where the Party must not demur to the Evidence.

- (11.) Adjudged, that where there is Special Matter to avoid the Plaintiff's Action, which the Defendant cannot give in Evidence upon the general Issue; in such Case he must plead it specially, but he needs not where he may give it in Evidence upon the General Issue.

2 Vent. 294.

- (12.) So where-ever there is a meer Matter of Fact to avoid the Plaintiff's Action, the Defendant may plead the General Issue and give it in Evidence; but if that Matter of Fact contains likewise Matter of Law, the Defendant may either plead specially or generally, and give the Special Matter in Evidence.

(13.) Adjudged, that where the Issue is Payment at the Day and Place, in such Case, Payment before the Day, or at any other Place, is good Evidence, for Payment before the Day is Payment at the Day.

(14.) So if the Issue is Assets at such a Place, 'tis good Evidence to prove Assets at another Place; for Assets any where is Assets every where.

E X C E P T I O N.

Cudlip *versus* Rundall. Hill. 3 Will. III. B. R.

4 Mod. 11.
That it was
an Action on
the Case.
What shall
not be an Ex-
ception out
of an Excep-
tion.

(1.) **C**ovenant, &c. in which the Plaintiff declared, that he being possessed of a Messuage, demised it to the Defendant for seven Years, and that he so negligently kept his Fire that the House was burnt; upon Non demisit pleaded, the Jury found a Special Verdict, (viz.) that the Plaintiff demised the said House to the Defendant, with all Out-houses, &c. Except the New House lately built upon the Premises, for the Use of the Plaintiff and his family, and not to be let to any other Person whatsoever; and at all Times when the Plaintiff should not dwell there, to be used by the Defendant and his Assigns: The Question was, what Estate or Interest the Defendant had in this New House, and adjudged, that he was only Tenant at Will, because the New House was well excepted, which Exception was not avoided by the Words which follow, (viz.) And at all Times to be used by the Defendant when the Plaintiff doth not dwell there; for that Sentence doth not enure as an Exception out of an Exception, which sets the Matter at large, but only as a Declaration of the Plaintiff's Intention in making the Exception, therefore this Action will lie.

Wilson *versus* Armorer.

(2.) **D**EBT against an Heir, who pleaded, that he had nothing by Descent, &c. The Jury found a Special Verdict, that the Father was seised in Fee, and made a Feoffment to several Uses (Excepting two Closes for his own Life): Adjudged, that these Closes descended to the Heir, because there was no Use limited in the Closes; besides, this Exception being an entire Sentence, and having that Effect which the Law will not admit, because the Whole was before limited in Use, therefore it shall be rejected; 'tis like the Grant of an Advowson excepting the Presentation for the Life of the Grantor, which is wholly void; but 'tis not like a Lease of an House, excepting a Chamber to and for the proper Use of the Lessor, because those are Words which give the Lessor an Authority to dispose of the Chamber at his Will and Pleasure.

1 Vent. 87.
78, 106.
Raym. 207.
1 Lev. 287.
See 1 And.
129. S. P.
Exception,
where it shall
be rejected.

E X C H A N G E.

Anonymus.

(1.) **P**ermutatio Vicina est Emptioni, but Exchanges were the original and natural Way of Commerce, precedent to Buying, for there was no Buying till Money was invented; now, in exchanging, both Parties are Buyers and Sellers, and both equally Warrant; and as this is a natural rather than a civil Contract, so by the Civil Law, upon a bare Agreement to exchange, without a Delivery on both Sides, neither of the Parties could have an Action upon such Agreement, as they may in Cases of selling; but if there was a Delivery on one Side and not of the other, in such Case the Deliverer might have an Action to recover the Thing which he delivered, but he could have no Action to enforce the other to deliver what he agreed to deliver, and which the Deliverer was to have in Lieu of that Thing which he delivered to the other.

(2.) It

Where the
Word Ex-
change is ne-
cessary in the
Conveyance.

11 Rep. 80.
Moor 665.
S. C.

(2.) In Exchanges of Land the Word Exchange is necessary in the Conveyance, because it imports a Special Warranty in respect of the mutual Consideration of the Lands exchanged; 'tis likewise necessary, that the Estates of both Parties be equal in Title, as if one hath an Estate in Fee, the other must have the like Estate; but 'tis not necessary that their Estates should be equal in Value.

Cro. Eliz.
903.
Yel. S.
Moor 665.
4 Rep. 121.
Bustard's
Case.

(3.) Adjudged, that if G. D. exchange five Acres with W. N. and afterwards the said W. N. is evicted of one of those five Acres which he had in Exchange, the Whole is defeated, and W. N. may enter on his own again, & sic è converso, if G. D. be evicted of one of his five Acres.

E X E C U T I O N.

Sid. 107.

(1.) **T**HE Plaintiff may take out Execution against the Bail, and if they pay Part of the Money, he may discharge them, and take Execution against the Principal for the rest, but he cannot proceed against the Principal till the Bail are discharged.

Mod. 312.
Vent. 329.

(2.) Judgment against four Defendants, if afterwards three surrender themselves, the Bail is still liable; but if the Plaintiff take three in Execution, the Bail are not liable, because in such Case they cannot bring them in.

2 Jones 97.

(3.) Upon a Fi. fa. the Defendant may pay the Money to the Sheriff, and may plead, that it was levied; but if he be in Execution he cannot pay it to the Sheriff and plead it to a new Action of Debt, neither can he pay it to the Sheriff if he is taken upon a Ca. fa. because he hath no Authority to receive it.

Sid. 184.

(4.) The Plaintiff obtained a Judgment for 2000 l. and brought an Elegit, and levied 400 l. he cannot have any other Execution, but he may have an Action of Debt upon the Judgment for the Residue of the Debt, because 'tis not satisfied, and the Elegit is only by the Statute as a farther Remedy; and in the principal Case, the Extent being only of a Term for Years, the Elegit was executed but as a Fieri facias.

(5.) Where Goods are taken in Execution, the Property of the first Owner ceases by his Seizure. 1 Vent. 53.

(6.) If a Prisoner escapes, who was in Execution, his Creditor may retake him by a Ca. Sa. or bring an Action of Debt on the Judgment, or a Scire facias against him, for he hath still an Interest in the Body, as a Pledge for the Debt. 1 Vent. 269.

(7.) Where a Fi. fa. is delivered to the Sheriff to levy 20 l. and he take an entire Thing in Execution (viz.) an Horse worth 30 l. and sells it for so much, and returns, that he levied the 20 l. he may retain the other 10 l. till the Defendant demands it, for he (the Sheriff) is not bound to look after the Defendant; but if on a Fi. fa. for 20 l. he levy five Oxen, worth each of them 5 l. and sell them for so much, the Defendant may have an Action of Trespass against the Sheriff. Noy 59.

Smallcomb *versus* Buckingham.

(8.) **I**n this Case it was held, that at Common Law, all the Lands were bound which the Party had at the Time of the Judgment given against him, and the Judgment always related to the first Day of the Term; but now, by the Statute 29 Car. 2. the Judgment binds the Lands (as to Purchasers) from the Time it was signed. 1 Salk. 320.
Judgment binds from the Time it was signed.

So at Common Law, the Goods were bound from the Teste of the Execution, tho' that might be antedated, and if the Defendant sold the Goods after the Teste, or died, the Sheriff might levy them; but now, by the aforesaid Statute, they are only bound from the Delivery of the Writ of Execution to the Sheriff, but not absolutely bound in all Cases; for if after the Delivery of the Writ, and before Execution executed, the Defendant becomes Bankrupt, that will hinder the Execution. The Goods are bound from the Delivery of the Writ of Execution to the Sheriff, and not from the Teste.

Anonymus.

(9.) **R**uled, that where an Extent is upon a Statute-Merchant, there needs no Liberate, for the Sheriff may deliver all in Execution without it; but where an Extent is upon a Statute-Staple, or upon a Recognisance, there must be a Return made of such an Extent, and then a Liberate, before there can be a Delivery in Execution; 'tis for this Reason, that a Statute-Merchant is said to include a Liberate, and that the * Sheriff before the Where there needs no Liberate on an Extent.
* Hutt. 53.

Li-

Liberate upon the Extent, may take his Fees, but not where the Extent is upon a Recognisance.

Anonymus.

Where a Sheriff may be a Trespasser, but the Execution is good.

(10.) **W**here Judgment is given against one, who is in View of the Court, or in Westminster Hall, it may be executed immediately, and the Party taken or sent for into Court and committed; and it was said, that if a Sheriff execute Process in another County, 'tis erroneous and void; so if he execute it in a County Palatine; but if he execute it within a Franchise in a County, or in the Isle of Ely, 'tis good, for being but a Liberty, 'tis still Part of the County; and tho' the Sheriff may be a Trespasser, yet the Execution shall stand good.

EXECUTOR.

2 Lev. 26.

(1.) **C**ovenant with the Feoffee, his Heirs and Assignes, that they should quietly enjoy; the Feoffee was evicted and died. Adjudged, that his Executor may bring an Action of Covenant, for the Eviction being made to the Testator, he could not have an Heir or an Assignee to this Land; but his Executor represents his Person, who was damaged by the Breach of this Covenant.

2 Lev. 145.

(2.) Debt against Husband and Wife, in which the Plaintiff declared upon a Devastavit against both of them; and upon a Demurrer to this Declaration, it was held ill, because a Feme Covert cannot commit Waste; tho' if she survives her Husband, she shall be chargeable for Waste done by him.

1 Vent. 187.

(3.) An Executor may bring Trespass, Quare blada crescentia in vita Testatoris messuit & asportavit; for Corn standing is a Chattel, and the Mowing and Carrying it away, was one entire Act; but if the Cutting was at one Time, and the Carrying away at another Time, then they are distinct Acts, and he must sue for the Carrying away only.

(4.) But an Executor cannot bring Trespass Quare herbam crescentem in vita Testatoris messuit & asportavit, because Grass growing is Part of the Freehold, and not a Chattel.

(5.) An Executor having Assets, may be compelled to redeem a Mortgage, for the Benefit of the Heir at Law; he shall be likewise compelled to pay a Debt for which the Heir was liable. Hardr. 512.

(6.) In Debt for Rent against an Executor, tho' 'tis brought in the Derinue, and the Term expired, he cannot plead a Bond of the Testator yet unsatisfied, because the Debt for Rent is of as high a Nature as the Debt upon the Bond: The Defendant cannot wage his Law in either Action, and a Bond given for the Rent would not extinguish the Action of Debt, which arises upon the first Contract. 2 Vent. 184.

Whitehall *versus* Squire. Pasch. 2 Annæ.

(7.) **T**HE Case was, A Man possessed of a Horse put it to Pasture to the Defendant, and died Intestate; W. R. desired the Defendant to bury him, and agreed, that he should have the Horse for his Charges, &c. accordingly the Defendant buried him, and laid out more Money than the Horse was worth; afterwards W. R. took out Administration, and now brought an Action of Trover for the Horse: Two Judges were of Opinion, that the Action would not lie, because the Plaintiff consented and agreed, that the Defendant should have the Horse. But Holt Ch. Just. held, that the Action would lie, because the Defendant was an Executor de son tort; 'tis true, such an Executor is only liable in Respect to the Value he hath received, and when he hath paid to that Value, he is no farther liable as to Creditors; but as to the Executors, or to a lawful Administrator, he is still liable in Respect of the Tort, in meddling with what by Law belonged to them, and they may bring Trover against him; yet Evidence being given of what he justly paid, he may be recouped. 1 Salk. 295.
Executor de
son Tort lia-
ble to Right-
ful Execu-
tor or Ad-
ministrator.

The King versus Sir Richard Raines. Mich. 12
Will. III. B. R.

1 Salk. 299.
Mandamus to
admit an
Executor to
prove a Will.

(8) **M**ANDAMUS to admit an Executor to prove the Will of his Testator; the Chancellor returned, that true it was, the Party was Executor, but that he was only Executor in Trust for such Children of the deceased, and that he was very Poor, and absconded from his Creditors, by Reason whereof he (the Chancellor) refused to grant Administration, until the Party should give Security to perform the Will, &c. It was urged to maintain this Return, that there are three Sorts of Executors, (viz.) there is an Executor legitimus, and that is the Ordinary himself; there is an Executor datus, and that is where one is appointed by the Ordinary to administer, &c. and he always gives Caution, &c. and there is Executor Testamentarius, and that is where one is appointed by the Will of the Testator; and that in this last Case the Ordinary may take Security of him by Caution, as well as they do by Oath. But by Holt Ch. Just. where a Man is made Executor, he cannot be sued to Account but only in Respect of Creditors and Legatees, for the Residue is his own by the Common Law; and so it is of an Administrator, because by the Statute 31 Ed. 3. an Administrator is put in the same State and Condition with an Executor; now, an Executor being properly an Officer, 'tis reasonable he should take a Promissory Oath, because this is of Common Right in all Cases of Officers; but 'tis not of Common Right to demand collateral Security of them, and the Ordinary cannot put Terms upon him where the Testator hath put none, neither can he pronounce him to be no Executor, when the Testator hath made him so.

Wankford versus Wankford.

1 Salk. 309.
Where the
Obligee
makes the
Obligor Exe-
cutor, 'tis a
Release of
the Debt.

(9) **T**HIS Case is reported in 1 Salk. and 'tis much the longest in that Book; but here 'tis only stated, and the Argument of the Ch. Justice Holt exactly reported.

H. The Obligor married the Daughter of the Obligee, who afterwards made the Obligor Executor, who administered some Part of the Goods, and before he proved the Will he himself made a Will, and his Wife Executrix, and died, after whose Death she proved the Will of her late Husband, the Obligor, and took out Administration to the Obligee cum Testamento annex, and brought an Action against the Heir of the Obligor. The Question was,

was, whether the Obligee making the Obligor Executor was a Release of the Debt, and he held that it was.

(1.) Because the Obligor is in such Case to pay and receive, and where one and the same Person is to do both those Acts, the Action is released, but the Debt remains as Assets in the Hands of the Obligor, and by making him Executor, that amounts to a Payment and Release.

(2.) 'Tis otherwise if he had no Assets, because then there is no Person to pay, but only to receive, so that 'tis the having Assets that amounts to Payment. Plowd. 185. b.

(3.) If the Obligor administers to the Obligee, tho' there is Assets, this is no Extinguishment, and yet in that Case the same Person is both to pay and receive; the Reason is, because an Administrator comes in by the Act of the Ordinary, but an Executor (as in the principal Case) by the Act of the Party himself; but yet the Chief Justice held, that if an Administrator shall, out of his own Money, pay a Debt of the Intestate to the Value of a Bond Debt, which he (the Administrator) owed to the Intestate, this would be a Discharge of the Bond. 8 Rep. 136.
Sir John
Needham's
Case.

(4.) Where the Obligee dies and his Executrix marries the Obligor, this is no Extinguishment of the Debt; but if a Female Obligee marry the Obligor, this would extinguish the Debt, because it would be a vain Thing for the Husband to pay Money to the Wife in her own Right, but he might pay it to her as Executrix, because there might be Administration de Bonis non, of that as well as of other Goods, and it might be kept by it self; and if the Husband takes it, tho' it becomes his Goods, yet 'tis a Devastavit. 1 Leon. 320.
Moor 236.
1 Inst. 264.

(5.) If the Obligee makes the Obligor Executor, and he administers some Part of the Goods (as in the principal Case) and dies before Probate, the Debt is discharged, and this amounts to a Release, because by his administering he hath accepted to be Executor, and becomes a compleat Executor, and cannot afterwards refuse or waive it; and he may, before Probate, receive, pay, release and maintain any possessory Action, as Trover, or Trespas for Goods of his Testator taken since his Death; and he may, before Probate, avow for Rent due since the Death of his Testator, but not before, and the Right of an Executor is not like that of an Administrator, which is derived from the Ordinary, but 'tis entirely by Vertue of the Will, and the Probate gives him no Right, either to his Office or to an Action, for he may bring an Action before Probate, but an Administrator cannot before Letters of Administration granted; 'tis true, he cannot proceed in such Action before Probate, it being convenient in other respects, but not to give him a Right.

Plow. Com.
290.
1 Mod. 213.

(6.) Where an Executor is made, and he never administers, he may refuse whether he will administer or not; and thereupon

an immediate Administration shall be granted, (viz.) de Bonis W. R. intestati; but if once he administers, he cannot afterwards refuse or waive the Office, and Administration cannot be committed to another during his Life.

(7.) So likewise if he administers and dies before Probate, an immediate Administration, and not an Administration de Bonis non shall be granted, because he died ante onus super se susceptum in the Ecclesiastical Court.

(8.) Where an Executor dies after he hath administered and before Probate, and makes a Will, and W. R. Executor, such Executor can never be Executor to the first Testator, because he can never prove his Will, for he is not named in the Will of the first Testator, and no Person can prove his Will but he who is named in the Will; but if the first Executor had proved the Will, then his Executor would have been Executor to the first Testator, because the Probate of the Will would have been a Continuance of the first Executorship.

(9.) Where several Executors are made, they may all refuse, but if one administers, the rest cannot refuse, but they must all be named in Actions brought in the Right of the Testator, and notwithstanding such Refusal, any of them may release a Debt; and if the refusing Executor survive those who acted, and Administration is committed to another, 'tis void: But if such refusing Executor come into Court and refuse, in such Case Administration may be committed to another.

Upon the whole Matter, the Executor in the principal Case having administered Part of the Goods, tho' that Executorship was determined by his Death, yet he being once Executor by his administering, that operated as a Release of the Debt; and afterwards he dying before Probate, his Executor cannot be Executor to the first Testator so as to revive this Debt.

Yeoman *versus* Bradshaw.

Antea Bills of
Exchange 7.

(10.) **A**Djudged, that a Bill of Exchange shall be said to be Bona notabilia where the Debtor is, and not where the Bill is, for 'tis no Specialty in Law; for if an Executor pays Debts upon simple Contract, or suffers Judgment to pass against him, in such Actions he may plead such Payment or Judgment in Bar to an Action upon a Bill of Exchange; 'tis like an Award in Writing, which is no Chattel where such Award lies; for in Pleading, 'tis never said hic in Curia prolat', which shews that 'tis no Specialty.

Fees, Feuds, and Feoffments.

(1.) **F**eoda: Feuds were originally at Will, and then they were called Munera, afterwards they were for Life, and then they were called Beneficia; and for that Reason the Livings of Clergymen are so called at this Day, and afterwards they were made hereditary, and then they were called Feoda, and in our Law Fee-simple. Rel. Spei. 9.

(2.) When Hugh Caput usurped the Kingdom of France, about the Year 947, to fortify and support himself in such Usurpation, he granted to the Nobility, &c. that whereas till then they enjoyed their Honours for Life, or at Will only, they should from thenceforth hold them to them and their Heirs, which was imitated by William, called the Conqueror, upon his Accession to the Crown of England, for till his Reign Fees or Feuds were not hereditary, but for Life only, or for some determinate Time.

(3.) A Feoffment was originally the Grant of a Feodal Estate or Feud; but now 'tis the Grant of an Estate of Inheritance; and till Feuds and Tenures came in, Charters and Conveyances in Fee-simple were made by these Words Dedi & concessi, without the Words Feoffavi.

(4.) And until the Statute Quia emptores terrarum, the Feoffments were always tenendum of the Feoffor per homagium & servitium, but after that Statute they were made tenendum de capitalibus Dominis feodi, &c.

But now the Way of Pleading a Feoffment is thus, (viz.) That W. R. was seised in Fee of the Place where, &c. and being so seised feoffavit quendam W. W. inter alia per nomina omnium, &c. habend' & tenend' dict' tenementa, &c. præfat' W. W. & hæredibus suis in perpetuum ad solum opus & usum, &c.

Parsons *versus* Petitt.

A Special Verdict in Ejectment found, that there were two Jointenants in Fee, one of them made Livery within the View, (viz.) Go enter and take Possession, but before it was executed he married the Feoffee himself; it was argued, that this Feoffment was void, because there was no actual Entry pursuant

¹ Mod. 91.

² Lev. 34.

¹ Vent. 186.

Livery in the View, where good.

to the Libery, and that by the subsequent Marriage the Feoffee was seised in Right of his Wife, and now cannot by his Entry work any Prejudice to her Right; but adjudged that he might enter at any Time, for he had not only an Authority so to do, but an Interest passed by the Libery in View, by which As the Woman did all which was in her Power to do.

F E N C E S. *See Distress 3.*

Pool versus Longvill.

² Saund. 289.
Where the
Plaintiff's
Cattle e-
scape into
the Defen-
dant's Close
for Want of
repairing the
Fences,
which the
Defendant
ought to re-
pair, they
cannot be
distrained
for the De-
fendant's
Rent unless
levant and
couchant.

* Mod. Cases
198.

(1.) **I**N Replevin, &c. the Defendant avowed the Taking, &c. for Rent arrear; the Plaintiff replied in Bar, that he the Plaintiff was possessed of a Close adjoining to the Locus in quo, &c. and that the Defendant, and all those, whose Estate he had Time out of Mind, had made and repaired the Fences, &c. and that the Fences were not repaired, but for Want thereof his (the Plaintiff's) Cattle escaped out of his Close into the Locus in quo, &c. and that the Defendant took them before the Plaintiff had any Notice that they were there; and upon Demurrer to this Replication it was adjudged ill, which Judgment was affirmed upon a Writ of Error in B. R. the Court relying upon the Year-Book 10 H. 7. 21. b. where it is held, that if Cattle escape into another Man's Land, and the Lord distrain, 'tis not material whether they were levant and couchant, for the Distress is good; but the Reporter tells us, that there is a Difference, where a Lord distrains within his Lordship, and where a Lessor distrains for Rent arrear, for as to the Lord, 'tis not material whether the Fences are in Repair; but as to the Lessor, if he is bound to repair the Fences, he must take Care his Tenant shall do it: Et per * Holt Ch. Just. 'Tis fit this Case should be better considered, for it will be hard to maintain it.

The King versus the Inhabitants of Penrich. Pasch. 1.
Will III. B. R.

Inquisition to the Sheriff to enquire, what Malefactors threw down the Hedges and Fences of Lancelot Simpson, &c. and upon a Return thereof a * Distringas was awarded; it was objected, that there was not fifteen Days between the Teste and Return of the Original, and this was held to be a Fault per Curiam: It was also objected, that a Distringas ought not be awarded upon the Return of the Inquisition, but a Scire facias to shew Cause, &c. but adjudged, that a Scire facias was not necessary; then it was objected, that it doth not appear, that Sympson was Lord of the Manor, or had a Right to these Fences; but it was held, that need not be shewed, for if he had no Right, that ought to be objected on the other Side. And lastly, it was objected, that the Vill ought to have a Year and a Day to indite the Malefactors, and it appears, that this Inquisition was taken within the Year after the Offence committed: Adjudged, that a Year and a Day is not necessary to be allowed, but a convenient Time, and of that the Court may properly judge.

Inquisition for throwing down Fences in the Night-Time.

* Cro. Car. 280, 439, 580. Jones 307. Sid. 107.

Distringas upon the Statute Westm. 2. against the Inhabitants of the next Mills, for throwing down Inclosures. Two of the Inhabitants of each Mill appear, and plead, that the Inclosures were thrown down in the Day-Time, and not in the Night. Et per Curiam, Whether they were thrown down in the Day or Night 'tis not material, for if the Offenders were not known 'tis within the Statute, which gives the Remedy where the Offenders are not known, and where they are known, the Party hath Remedy by an Action of Trespass.

1 Lev. 106. Rex v. Inhabitants of Woodford. Not material whether thrown down by Night or by Day.

F I N E S.

Anonymous. Hill. 12 Will. III. B. R.

(1.) **P**ER Holt Ch. Just. at Common Law Fines were levied upon any Original Writ; as upon a Writ of Entry, Writ of Right, &c. as well as upon a Writ of Covenant, and they might be levied for any Thing for which a Præcipe quod reddat or permittat lies; and they are leviable in Counties Palatine by the Statute 38 H. 8. cap. 19. and 2 & 3 Ed. 6. cap. 28.

Clements *versus* Langham. Pasch. 2 Annæ.

Where the Cognisor died after the Caption, and before the Return of the Writ of Covenant. Fine levied by an Infant, who died before she was of Age.
1 Vent. 143,
170.
1 Ch. Rep. 278.

(2.) **E**rror of a Fine levied in the Court of Common Pleas; the Error assigned was, that the Cognisor died after the Caption, and before the Return of the Writ of Covenant, and for this Reason it was reversed. Sed, &c.

(3.) The Husband prevailed with his Wife, being about twenty Years of Age, to levy a Fine of her Inheritance; the Wife died. Et per Curiam, if she had been living and under Age, she might upon a Motion be brought into Court by an Habeas Corpus, and if by Inspection she be found to be under Age, the Court will set aside the Fine, and punish the Commissioners, who took the Caption; but at Common Law, there were no such Abuses, because all Fines were levied in Court; but now since the Statute 15 Ed. 2. which giveth the Dedimus, Fines have often been levied by Infants.

(4.) A Fine of all his Lands in the Parish of Blandford, shall pass all his Lands in that Parish, tho' in several Vills, but not out of the Vills, tho' in the Parish, &c.

(5.) A Fine and Nonclaim bars all Trusts and Equities, where the Equity charges the Land, but where it charges the Person in Respect of the Land, it will not bar; also an Equity or Trust, created by a Fine, shall never be destroyed or barred by the same Fine.

FORCIBLE

FORCIBLE ENTRY.

The Queen versus Griffith & al' Mich 1 Annæ
B. R.

(1.) **I**ndictment for a forcible Entry quashed, for not setting forth, that the Party was seised or disseised, or what Estate he had in the Tenement; for if he had only a Term for Years, then the Entry must be laid into the Freehold of A. in the Possession of W. R. and the Restitution must be accordingly: The Word Seisin is a Term of Art in this Case, it being upon the Statute of H. 6. but the Case in * Popham was upon the Statute † 21 Jac.

Indictment quashed for not setting forth, that he was seised or disseised.

* Poph. 205.
† 21 Jac. cap. 15.

Anonymus.

(2.) **A**t Common Law, where the Party had a Right he might enter with Force; but by the Statute 15 R. 2. he is restrained from entering with Force, tho' he hath a Right to enter; neither can he enter peaceably, and hold out manu forti per 8 H. 6 cap. 5. nor enter manu forti and hold out manu forti.

Now in these Cases, a Man may either proceed Civilly or Criminally; his civil Remedy is by Writ of forcible Entry, wherein he shall recover treble Damages and Costs; and this is upon the Statute of H. 6. and to this Writ the Defendant may plead Not guilty, or he may plead any Special Matter, and traverse the Force; and the Plaintiff in his Replication must answer the Special Matter, and not the Traverse, for there shall be no Enquiry of the Force, if the Special Matter is found for the Defendant, and if 'tis found against him, then he is convicted of the Force of Course.

(3.) But the Plaintiff can never recover in this Action, unless he maintain his Writ (viz.) that the Defendant expulit & disseivit eum; therefore he must have some Estate of Freehold at least, and such an Estate upon which the Defendant could not lawfully enter, otherwise it can be no Disseisin.

Z

(4.) But

(4.) But if W. R. is seised, and L. R. having good Right to enter, doth accordingly enter many forti, he might be indicted notwithstanding his Right, and Restitution shall be awarded.

The King versus Bengough. Trin. 11 Will. III.

Upon an Inquisition taken upon the View by one Justice, he cannot deny a Traverse of the four.

* Dyer 122, 359, 360.

(5.) **I**nquisition for a Forcible Entry upon the Possession of Land, was taken upon View by one Justice of Peace, and Restitution awarded; and now the Attorney-General moved for Restitution upon an Affidavit made, that when the Force was found, the Defendant tendered a Traverse of Not guilty to the Inquisition, which the Justice of Peace refused to accept; and per Curiam (except Gould Justice) the Justice of Peace should have accepted the Traverse, for the Fact was traversable, and that the Law was taken to be so in this Court during all the Time the Ch. Justice Keeling sat here: 'Tis true, in * Styles 'tis said, that upon an Indictment at Sessions the Justices may accept a Traverse, but that a Justice of Peace, upon an Inquisition of a Force taken upon his View, cannot accept a Traverse, because 'tis a Sort of Judgment upon his View; but the Law is taken to be otherwise.

1 Vent. 108.

(6.) The Indictment was, that W. R. being seised and possessed, &c. the Defendant entred; this was adjudged ill for the Incertainty.

1 Vent. 306.

(7.) So 'tis where the Indictment was, that W. W. entred and disseised him; for tho' a Disseisin may imply a Freehold, yet it ought to be expressed.

1 Roll. Rep. 406.

(8.) Indictment, &c. reciting the Statute 8 H. 6. to be (viz.) If any one be expelled vel disseised, this was adjudged ill; for the Statute is si aliquis expulsus & disseisitus in the Copulative and not in the Disjunctive, so the Person must be both expelled and disseised.

F O R G E R Y.

The Queen versus Goddard & al'. Trin. 2 Annæ.

(1.) **T**here is a short Note of this Case in 1 Salk. but the Case was as followeth: II. It was an Indictment for forging an Assignment of a Lease, the Indictment was, (viz.) Juratores, &c. super sacramentum suum presentant quod cum Testatum existit per quandam Indenturam quod W. R. dimisisset & concessisset & per eandem indenturam dimisit & concessit, &c. The Defendant falso fabricavit quandam assignationem sive scriptum, vel indorsamentum in scriptis, tenor cujus quidem assignationis sequitur, and then it sets forth the Assignment, in hæc verba; and at the Bottom there was the Mark of the Assignor, for he could not write his Name; but no Mark appeared upon the Postea: Et per Curiam, the * Quod cum is well enough, for 'tis but an Inducement to the Fact; and when the Indictment comes to charge the Forgery, it charges it in a particular Manner; 'tis true, 'tis otherwise in an Action of Trespass, for there Quod cum is only Recital and no positive Charge: Et per Holt and Powis, the Words per eandem Indenturam concessit were a positive Averment of a Lease, and had no Relation to the Testatum existit, but Powell and Gould contra: And per totam Curiam, the Want of the Mark of the Defendant upon the Postea was a fatal Defect, for by the Statute of Frauds, &c. a Lease is not assignable without a Writing signed by the Party: But per Holt Ch. Just. If the Indictment had been for forging a Deed of Assignment, and the Fact had been set forth without any Mark or Signing, that might have been good, because Signing is not necessary to a Deed, for in former Times they were only sealed and not signed; but now, since the Statute of Frauds, &c. an Assignment by Writing, if 'tis no Deed, yet it must be signed, and this being no more, it ought to have been signed, otherwise 'tis no Assignment: And now the Court being informed, that there was a new Indictment found against the Defendant, they would not give Judgment upon these Exceptions, but ruled the Defendant should plead to the Signing: And per Holt Ch. Just. the Defendant cannot plead over in any Case but in Treason and Felony, and being found

1 Salk. 342.
Indictment
for Forgery
not good.

* Postea In-
dictment 6.

guilty, he could not plead the other Indictment pending in Abatement, but must plead autrefois convict.

The Queen versus Brown.

Mod. Cases
87.
Indictment
for Forgery
not quashed.

* 1 Lev. 303.
2 Lev. 125.

(2.) **I**NDICTMENT for forging a Cecquet pro quinq; Sarcinis lini, Anglice, five Packs of Linen Cloth; and being found guilty, it was moved in Arrest of Judgment, that the Indictment was ill, because it was uncertain how much Cloth there was in those Packs; but adjudged, that 'tis sufficient to describe the Thing in which 'tis contained: As for Instance, * Duas Sarcinas Canapis, Anglice, two Bundles of Hemp.

The King versus Marsh.

Information
for Forgery
compound-
ed.

(3.) **O**N E Marsh was found guilty of Murder upon the Coroner's Inquest, and afterwards the Coroner inserted the Names of two other Persons as found guilty by the same Inquest, who, together with the said Marsh were indicted upon the said Inquest, which being tried at Bar, they were all acquitted; afterwards two of the Jury of the Coroner's Inquest made Oath, that they found the Indictment only against Marsh, and that the Coroner took the Indictment, it being in English, and told them he must engross it in Latin, which was done, and then he inserted the Names of the other two Persons, whereupon an Information was brought against him for a Forgery, which was tried at Bar, and he was found guilty, but having compounded with the Prosecutor, was fined only twenty Nobles.

Watts's Case.

Hardres 331.
Who shall
not be a Wit-
ness to an
Information
for a For-
gery.

(4.) **I**NFORMATION against the Defendant for Forgery, and for publishing a forged Deed, knowing it to be forged: adjudged, upon a Conference with the Judges of B. R. to whom one of the Barons of the Exchequer was sent, that no Person who is or may be a Loser by the Deed, or who may receive any Benefit or Advantage by the Verdict being found against the Defendant, shall be a Witness.

FOREIGN PLEA.

Cholmly *versus* Broom. Pasch. 9 Will. III. B. R.

DEBT against the Defendant in Custodia Marecalli, upon ^{5 Mod. 335.} a Bond sealed and delivered at Chester: The Defendant pleaded, that he was an inhabitant in Chester, and at the Time of the Action brought lived in Chester, &c. The Plaintiff taking this to be a Foreign Plea, and therefore ought to be sworn, which not being done, he entered Judgment: But it was set aside, for per Curiam, a Plea to the Jurisdiction is no Foreign Plea, nor a Plea of Privilege, nor of Antient Demesne, which Pleas are never sworn: A Foreign Plea is where the Defendant by his Plea would remove the Cause of Action out of the County where the Plaintiff had laid it; but 'tis no Foreign Plea where the Defendant agrees the Place and County, as the Plaintiff had laid it.

Sparks *versus* Wood.

IN an Action of Debt in London, the Defendant moved for a Prohibition, suggesting, that he tendered a Plea in the inferior Court, that the Cause of Action did not arise within the Jurisdiction of that Court, and offered to make Oath of it, and now would have made Affidavit of the Truth of the Fact, and of his Plea in B. R. Sed per Curiam, Oath ought to be made of the Truth of the Plea in that very Court whose Jurisdiction is denied; and it appearing that he tendered such Oath after the Court was up, this Prohibition was denied, for it ought to be done sedente Curia and in propria persona. ^{Mod. Cases 146. In what Court Oath ought to be made.}

FRAUD

FRAUD and COVIN.

(1.) **B**y the Statute 13 Eliz. cap. 3. all fraudulent Conveyances as to Creditors are made void, and by the Statute 27 Eliz. cap. 4. they are made void as to Purchasers.

(2.) Now upon the first of these Statutes, if a Man gives his Goods to his Son, yet they are still liable as to his Creditors; but if he gives them to one of his Creditors Bona fide, without any Trust or Covin, they shall not be liable to other Creditors.

(3.) So if a Man is indicted and give away his Goods to prevent a Forfeiture, the King shall have them upon an Attainder or Conviction; otherwise if he sell them to one for a valuable Consideration, who had no Notice of the Indictment.

Vent. 257.

(4.) If Tenant for Life commit a Forfeiture, so that by the Entry of him in the Reversion his Creditors may be defeated, this is a fraudulent Conveyance as to them.

Sid. 133.

(5.) Upon the Statute 27 Eliz. if a Man leby a Fine to the Use of himself for Life, Remainder to his Son in Tail, and afterwards sells the Fee-simple to W. R. he, as a Purchaser, shall avoid this Conveyance, because it was voluntary, and therefore fraudulent; so it had been if he had settled the Remainder on his Wife, unless there had been a Consideration or precedent Marriage.

(6.) The Father made a Lease for twenty-one Years, in Trust for his Daughter till Marriage; and if she married with his Consent, then to her during the Term, this till Marriage is fraudulent as to a Purchaser, but after Marriage 'tis good, because Marriage is an Advancement to the Daughter, and the Husband was drawn in by this Conveyance to marry her.

2 Lev. 148.

(7.) The Husband was a Tradesman, and his Wife was an inheritrix, and he promised her, that if she would join with him in a Sale of her Land, and let him have the Money to pay his Debts, that he would leave her 400 l. about six Months after the Lands were sold, he gave Bond to W. R. to leave his Wife 400 l. adjudged, this is not fraudulent, but good against Creditors.

G A M I N G.

Smith *versus* Ary. Hill. 2 Annæ.

(1.) **I**Ndebitatus Assumpsit, in which the Plaintiff declared, that in Consideration he had promised the Defendant to play and to pay what he lost; the Defendant promised to play, and to pay the Plaintiff what he (the Defendant) lost; Cumq; etiam, that he (the Plaintiff) had won so much Money ad ludum prædict', the Defendant in Consideratione inde promised to pay it: The Court agreed, that here were mutual Promises laid in the first Count, but that an * Indebitatus would not lie upon those Promises; 'tis true, it was insisted for the Plaintiff, that the mutual Promises in the first Count must be understood, as if repeated in the second, because the Play was upon the same Agreement, and the Money was alledged to be won ad ludum prædict'. But per Curiam, the second Count is not the better for the first, for they are separate and distinct from one another, so that the Agreement laid in the one will not go to the other; and if so, then there is nothing to support this Action but the mutual Promises, and Debt will not lie upon a Promise, and consequently an Indebitatus will not; for there must be a Consideration, or a Quid pro quo to support it.

Mod. Cases
128.
*Indebitatus
Assumpsit* will
not lie upon
mutual Pro-
mises.

* 2 Vent. 175.
3 Lev. 118.
contra.
5 Mod. 13.
1 Lutw.
*Whityear v.
Chancy.*
Moor 776.

Rostington's Case.

(2.) **O**NE covenanted, that his Horse should run four Beats with the Horse of W. R. for 30 l. each Beat, which in all amounts to 120 l. Adjudged, that tho' he win every Beat, he can recover no Part of the Money, for tho' they were distinct Wagers, yet the Contract was entire.

1 Vent. 255.
2 Lev. 92.
Tho' the
Wagers are
distinct, the
Contract is
entire.

Eggleton *versus* Lewin.

INdebitatus Assumpsit for 20 l. won at Cards, there was Judgment by Default, and a Writ of Enquiry executed, &c. and upon a Writ of Error in the Exchequer Chamber; the Error assigned

*Indebitatus
Assumpsit* lies
for Money
won at Play,
&c.

signed was, that a General Indebitatus Assumpsit would not lie for Money won at Play, and the greater Number of the Judges inclined, that it would; But per Holt Ch. Just. and Pollexfen, Ch. Justice of C. B. that it would not, because there must be some meritorious Act, as a Consideration to maintain such Action; it will lie against him who holds the Money, because the Law implies a Promise, to deliver the Money to the Winner.

G U A R D I A N.

(1.) **A** Guardian is either legitimus, testamentarius, datus, or custumarius.

(2.) He who is a lawful Guardian is so either jure communi, or jure naturali; the first as Guardian in Chivalry, who is so either in Fact or in Right, the other de jure naturali, as Father or Mother.

(3.) A Testamentary Guardian by Common Law; for the Body of the Pupil was to remain with him who was appointed by the Testator, till the Age of 14. but as for his Goods it might be longer, or as long as the Testator appointed; and as to this Matter there are several * Statutes, which you may see in the Margin.

* 32 H. 8.
34 H. 8.
4 & 5 Ph. &
Mar.
12 Car. 2.

(4.) Guardianus datus, by the Father in his Life-time, or by the Lord Chancellor after the Death of the Father.

(5.) And lastly, there is a Guardian by Custom, as of Orphans by the Custom of London, and other Cities and Boroughs.

(6.) By the Civil Law, Id quod a tutoribus arrogatur potius justitia quam aliena autoritate firmatur, therefore the Guardian is to educate his Pupil pro facultate patrimonii & dignitate natalium; and this Word Education comprehends Food, Raiment, Lodging, Physick and Schooling.

(7.) He shall answer for what is lost by his Fraud, Fault, Negligence or Omission, but not for any casual Events, as where a Thing had been well but for such an Accident.

(8.) He ought to sell all Moveables in a reasonable Time, and turn them into Land or Money, especially if they were bona pecunia, for those yield no Profit: yet in some Cases this Rule may fail, as where the Pupil is near being of Age, and may want such Goods.

(9.) He shall pay Interest for Money in his Hands, which he might have put out at Interest, for in such Case he shall be presumed to make use of it himself.

(10.) If 600 l. is due and in Arrear from the Infant's Estate, and the Guardian compounds it for 100 l. the Infant shall have the Benefit of such Composition, and not the Guardian.

(11.) Now as to Guardianus datus, this Case happened; The Father devised the Tutition of his Son, being seven Years of Age, to his Mother in Law, and died; afterwards the Widow married her Servant, and being Poor, the Uncle gets the Possession of the Infant, and sends him beyond Sea, but the Lord Chancellor ordered him to send for and restore the Infant; for where there is a Guardianship by the Common Law, this Court can order and intermeddle, but where by Statute, as in this Case, the Court cannot remove either the Child or Guardian; but we can and will make him give Security not to marry the Infant without the Court is first acquainted with it.

Where a Father devises his Child to a Guardian the Chancery cannot interpose.
2 Ch. Rep. 237.

(12.) And as to a Guardian by Custom, as in Copyhold Manors; if the Copyholder has a Son within Age, and die, the Guardianship doth de jure belong to the next of Kin, to whom the Lands cannot descend; but by Custom it may belong to the Lord of the Manor, either to be Guardian himself, or to appoint one.

Hutt. 16.
Hob. 215.
Lutw. 1188.

(13.) The Father in a Copyhold Manor, and being a Copyholder himself, cannot by Vertue of the Statute * 22 Car. 2. appoint a Guardian for his Son, for there may be a Custom to the contrary, and to alter that Custom may be prejudicial to the Lord of the Manor.

3 Lev. 395.
2 Lutw. 1182.
* Cap. 24.

(14.) Where an Infant has only a Personal Estate, the Ecclesiastical Court may appoint a Curator or Guardian as to that, and may take Security of such Curator by Bond, for due Performance

formance of his Trust; but it hath been a Question, whether such Bond should be taken in the Name of the Ordinary and Commissary, or in the Name of the Ordinary only.

Bridget Hide's Case.

2 Lev. 128.
An Infant being in the Custody of her Father in Law, the Court ordered him to enter into a Recognisance not to suffer her to marry, &c.

(15.) **B**ridget Hide, being the Daughter and Heir of Sir Thomas Hide, and about thirteen Years old, and her Mother having married Sir Robert Viner, and she being dead, the Court was moved for a Habeas Corpus to be directed to Sir Robert Viner, in whose Custody she was left, and who had no Right to her, so that her Aunt was Guardian at Law; and she being brought into Court, it was suggested, that he intended to marry her to a great Person, but of small Fortune, tho' she was already married to one Mr. Emmerton, by the Consent of her Mother whilst living, which Marriage being questioned, and the young Child being asked by the Court, whether she was willing to stay with her Father-in-Law? she answered, that she was; whereupon he was ordered to enter into a Recognisance of 40000 l. not to let her marry whilst she was in his Custody, and to permit her Aunt to visit her.

H E I R.

Killow *versus* Rowden. Hill. 2 Will. III. B. R.

2 Lev. 286.
3 Mod. 253.
Debt brought against an Heir, without shewing how Heir, good.

(1.) **D**EBT against the Defendant as Heir to his Father, without shewing how he was Heir; upon Riens per Descend pleaded, the Jury find, that John Rowden, the Father, being seised in Fee entered into this Bond, for which the Suit was now brought, and afterwards he settled his Lands to the Use of himself for Life, Remainder to his eldest Son in Tail, Remainder to his own Right Heirs, and died; after whose Death the eldest Son entred and died, leaving Issue a Son, who also died without Issue, so that the Reversion (after the Estate-tail being

being spent) came to the second Son of the Obligor, who was now Defendant; and the Question was, whether he had the Estate by immediate Descent from him, or from his Nephew, who was the only Son of his elder Brother: Et per Curiam, neither the elder Brother or his Son, were ever seised of the Reversion, for they were seised of an Estate-tail, and not of the Reversion expectant upon the Determination of that Estate, and if a Formedon had been brought against the Defendant he should not in making his Title have mentioned either his * elder Brother or Nephew; and yet they were seised of the Reversion to some Purposes, (viz.) to give, to forfeit, to be in Ward, and to join the Issue upon the meer Right.

* 1 Inst. 14. b.
Dyer 308. b.
1 Cro. 412.

(2.) In Debt against the Heir upon the Bond of his Ancestor, he cannot plead that W. R. is Executor, and hath Assets sufficient to pay the Debt, because the Plaintiff ought to have the Benefit of his Security, and by Consequence his Election to charge either Heir or Executor; but in such Case the Heir by a Bill in Equity against the Executor shall be relieved.

3 Lev. 189.
Hard. 515.
Where an Heir shall be relieved against an Executor in respect of Assets.

(3.) Adjudged, that the Heir is never bound without an express Lien and Assets, and even then no longer than he hath Assets, for he is not bound to keep them till he is charged; but if he hath Assets he ought to plead truly and to confess them, otherwile a Judgment general shall be given against him de terris propriis, for 'tis now his Debt.

Jones 88.
Heir bound no longer than he hath Assets.

Redshaw *versus* Hesther.

(4.) **D**EBT against the Defendant as Heir upon a Bond of his Ancestor; upon Riens per Descent pleaded, the Plaintiff replied, that he had Lands by Descent ante exhibitionem Billæ, unde de debito prædicti satisfacisse potuit, & petit judicium Curia; and upon a Demurrer to this Replication it was objected, that the Plaintiff ought to have concluded to the Country; besides, the Replication is ill at Common Law, because 'tis, that the Defendant had Lands by Descent ante exhibitionem Billæ, which may be true, and yet he might have none at the Time of the Bill exhibited; 'tis likewise ill by the * Statute, for that directs, that where the Heir sells any Lands which were liable to the Debts of his Ancestor, before any Action brought against the Heir, he shall be answerable for the Value of the Lands so sold, which Value should be tried by a Jury, who, upon finding that such Lands descended, are ex Officio to inquire of the Value; therefore the Replication should be, that the Defendant had Lands by Descent, before, or at the Time of the original

5 Mod. 122.
Debt against an Heir, good.

* 3 & 4 Will. 3.

Utit, &c. without alledging unde de debito satisfecisse potuit, and then concluding unde petit judicium, &c. because 'tis making the Value Part of his Replication, and putting it upon the Judgment of the Court, when it ought to have been tried by a Jury: Sed per Curiam, the Replication is good, for tho' a Jury may find, that what descended to the Heir is not sufficient to satisfy the Debt, and so may falsify the Value alledged in the Replication, yet the Plaintiff shall recover to the Value of the Land sold be it what it will.

Osbaston versus Stanhope.

2 Mod. 50.
Debt against
an Heir, who
pleaded, that
he had no-
thing by De-
scent *prater*
Reversionem,
not good.

(5.) **D**EBT against an Heir upon a Bond of his Ancestoꝝ; the Defendant pleaded, that he had nothing by Descent *prater* the Reversion expedant after the Determination of a Lease for Years; the Plaintiff replied, that he (the Defendant) had sufficient Assets by Descent; and upon a Demurrer it was objected, that this general Replication was ill, for that the Plaintiff ought to have answered the *Prater*: Sed per Curiam, the *Prater* is immaterial, because the Reversion which follows is not chargeable, for the Ancestoꝝ had settled the Lands upon Trustees to the Use of himself for Life, Remainder to the Heirs Males of his Body, Remainder to his own right Heirs, with Power for the Trustees to make Leases, so that this was a Lease made by them, and if the Reversion should happen before the Estate-tail spent, he had still but a Reversion after an Estate-tail.

HERIOT. See Suit of Court 3.

Smartle *versus* Penhallow. Hill. 1701. B. R.

(1.) **I**N a Special Verdict in Ejectment, the Case was, the Custom of a Manor was, that a Copyholder might surrender for three Lives successive, and that an Heriot was due on the Death of every Tenant; a Copyholder surrendered to W. R. for his own Life, and for the Lives of A. B. and C. D. and the Question was, whether this was warranted by the Custom, and adjudged that it was, and that it was no Inconvenience to the Lord of the Manor, for there could be no Occupancy; but Powell Justice doubted, because of the Statute of Bankrupts: Sed per Holt Ch. Just. the Statute makes no Difference, for if the Copyholder becomes Bankrupt, and his Estate is assigned by the Commissioners, the Assignee would have it determinable upon the Life of the Copyholder Bankrupt, and that the Heriot would be then due, but not upon the Death of the Assignee, because it was so originally, and cannot be altered by the Act of the Copyholder himself.

Mod. Cases 63.
1 Salk. 188.
Custom, that a Copyholder might surrender for 3 Lives successive, and that an Heriot was due on the Death of every Tenant.

Osborne *versus* Sture.

(2.) **I**N Trespals the Case was, a Lease was made to Dorothy Edgcomb for ninety-nine Years, if she and Margery Upton should so long live, under the yearly Rent of 20 s. and also after the Decease of the said Dorothy and Margery, her or their best Beast in the Name of an Heriot, that the Plaintiff Osborne married Dorothy Edgcomb, and in Right of his Wife was possessed, and that she and the said Margery Upton were dead, and that the Defendant took the Gelding for an Heriot after the Death of Margery, &c. and upon a Special Demurrer it was objected, that an Heriot ought not to be paid, for this being an Heriot-Service reserved on a Lease, is of the same Nature with all other Services reserved on Leases, and that is to be paid whilst

2 Lev.
2 Lutw. 1366.
3 Mol. 230.
Heriot-Service, where to be paid.

whilst the Lease is in Being, but here it was determined by the Death of Margery, and there was no Reversion in the Defendant at that Time; two Judges were of that Opinion, but two more held, that the Defendant had a reversionary Interest in that Instant of Time that Margery died, and that the Seising the Gelding shall relate to that Time.

H I G H W A Y S.

What is an Highway and what a private Way.

(1.) **A**Djudged, that where a Way leads to a Market-Town, or communicates with a great Road, 'tis a Highway; but if it leads to a Church, or to a Vill, or to a particular House, 'tis a private Way, and in an Highway, which is called Via Regia, the King hath only the Passage for himself and the People; for the Freehold of the Soil is in the Lord of the Manor, or in the Owner of the Land on each Side, and if there are Trees and other Profits there, they belong to him.

Who are to repair Highways and private Ways.

(2.) Now, as to Reparation of each, a private Way is to be repaired of common Right by that Vill or Hamlet where it lies, but a publick Highway is to be repaired by the whole Parish, unless some private Person is bound to do it, either by Prescription, Tenure, or Encroachment.

Lessee for Years cannot be charged *ratione tenurae*.

(3.) But Lessee for Years cannot be charged *ratione tenurae*, because that goes with the Inheritance.

Cro.Car.306. Where a Highway is turned to another Place, he who turns it must keep it in good Repair.

(4.) Where an Highway lies over an open Field, and the Owner of the field turns the Way to another Part of the Field for his own Convenience, or encloses the Field for his own Benefit, and leaves a sufficient Way besides, he is bound to repair and maintain that Way at his own Charge, and he must make it passable, tho' it was foundrous before; and if the Way is not sufficient, any Passenger may break down the Enclosure and go over the Land, and justify it till a sufficient Way is made, and in this Case the Jury are only to inquire if it is the antient Way, if it is inclosed for the Profit of the Owner of the Soil, and if it is foundrous; and it being proved, that it was impossible to make the Way, because of the Soil: Per Curiam, Lex neminem cogit ad impossibilia, but in this Case the Defendant

good

had bound himself to make the Way good by enclosing the field, and that if he would take away the Enclosure, the Charge would fall upon the Parish. Et per Curiam, tho' he hath made the Way as good as 'tis capable of being made, he shall not give that in Evidence in Discharge of the Information, but he may give it in Evidence, in Mitigation of the Fine.

(5.) Information against a Common Carrier, setting forth, that no Waggon ought to carry more than 2000 Weight and that the Defendant used a Waggon with four Wheels, & cum inusitato numero equorum, in which he carried 3000 or 4000 Weight at one Time, by which he spoiled the Highway, leading from Oxford to London (viz.) at Lobb-Lane in the Parish of Holfely; this was adjudged good, tho' it was laid generally at Lobb-Lane, without shewing how many Perches in Length, because the Nuisance was alledged, for all the Way leading from Oxford to London, and Lobb-Lane was mentioned only for the Venue; and tho' there was no particular Measure expressed how much of the Way was spoiled, it shall be intended all Lobb-Lane was spoiled; likewise, tho' 'tis said, that he went inusitato numero Equorum, without setting forth what Number, yet the Information is good, because it was the excessive Weight which he carried that made the Nuisance.

Mich. 17
Car.
Egerly's Case.
Information
against a
Common
Carrier, for
overloading
his Waggon.

(6.) The Defendant was indicted for stopping the King's Highway in Kensington, without setting forth any Boundaries or buttals in the Way, leading from such a Town to such a Town, yet adjudged good, for an Highway shall be intended to go through out the Kingdom; but 'tis otherwise, if the Indictment had been for stopping a private Way.

Noy 90.
Larch 182.
2 Leon pl. 13.
Indictment
for stopping
a Highway,
good.

(7.) Upon an Indictment for Stopping a Highway, the Course of the Court is, that the Defendant may be admitted to a Fine upon his Submission, and a Certificate of repairing either before or after Verdict; but if after Verdict, there must be a constat to the Sheriff, that he may return that the Way is repaired, for the Verdict being a Record of Conviction must be answered by Matter of Record.

Raym. 215.
The Defen-
dant may be
admitted to
a Fine after
a Verdict on
a Certificate
that the
Way is re-
paired.

(8.) Indictment against a Parish, for not repairing a Highway; upon Not guilty pleaded, they cannot give in Evidence, that another is bound to repair, for if that be the Case, it must be pleaded; but where a private Person is indicted for not repairing, he may give in Evidence, that another is to repair, because he is not bound of Common Right, as the Parish is.

1 Vent. 256.
The Defen-
dant cannot
give in Evi-
dence, that
another Pa-
rish is bound
to repair, for
it must be
pleaded.

H U E and C R Y.

(1.) **B**Efore the Statute of Winton, the King had a certain Farm or Rent out of each County in England, for keeping Watch and Ward, and by that Statute the Counties were discharged of this Rent, being enjoined to do it themselves.

Noy. 155.
Where Notice is to be given of the Robbery.

(2.) The Person robbed ought to give convenient Notice thereof, as soon as he can; and being robbed in the Hundred of A. and not knowing the Confines of that Hundred, he goes into the next Hundred and gives Notice there, 'tis sufficient, for that Hundred ought to make Hue and Cry, and by that Means the other Hundred of A. will know of the Robbery.

The Purchaser of the Lands is liable to the Charges after a Robbery done. The Person robbed is not bound to pursue Robbers.

(3.) If after a Robbery a Hundredor sells his Lands, the Purchaser or Lessee is liable, for 'tis a Charge upon the Land itself.

(4.) The Party robbed is not bound to pursue the Robbers himself, or to lend his Horse for that Purpose; and if he know any of the Robbers he must enter into a Recognisance to prosecute; but still he has Remedy against the Hundred, if they are not taken.

Sid. 11.
Where the Hundred is discharged.

(5.) And if any of them are taken within forty Days after the Robbery, or if they take them before the Plaintiff recovers, the Hundred is discharged.

Of the Oath to be made of the Robbery.

(6.) The Party robbed must make Oath before a Justice of Peace, that he did not know the Robbers, or any of them; this he is enjoined to do by the Statute 27 Eliz. cap. 13. Therefore where an Action was brought on the Statute of Hue and Cry, and upon Not guilty pleaded, the Plaintiff had a Verdict; it was objected in Arrest of Judgment, that no Time was laid of the Examination before a Justice of Peace within twenty Days before the Action brought, which is traversable.

I D E O T. *See* Remainder.

I M P A R L A N C E.

The Queen versus Rawlins. Mich. 4 Annæ B. R.

A ^{243.} ^{1 Salk. 367.} Information was filed against Rawlins on the first Day of Michaelmas-Term, on which Day he was bound by Recognisance to appear, and accordingly did appear and prayed an Impar lance. And per Northey Attorney-General, formerly, when the Defendant came in by Habeas Corpus, or upon his Recognisance, he was to plead instanter, that if a Declaration in a Civil Action is delivered the first Day of Michaelmas-Term, or at any Time before Crastin' Animarum, tho' the Defendant is not bound to plead so as to try the Cause that Term, yet he shall plead so as to enter, and that the Defendants ought not to have greater Indulgence on the Crown-side; therefore in this Case he insisted, that the Defendant should imparl only to Crast. Animarum of that Term. Et per Holt Ch. Just. Imparlances may be to a Day certain, or to a Return-Day of the same Term, or from one Term to another; and that it was reasonable in this Case to give the Defendant Leave to imparl not to a Day in the same Term, but to a Day of another Term, because, if a Summons had issued, and Process had been continued, he might have stood out to another Term, but might have been brought in before the End of that Term, and then he must have pleaded Instanter, and so he shall do now in another Term.

Ellis *versus* Thomas. Hill. 9 Will. III.

Where Impar-
lance is
to be allow-
ed, where
not.

Imparlances are allowed in General Actions of Trespas, but not in a Special Clausum fregit. Et per Holt Ch. Just. If it appears upon the Record, that an Imparlance was due and denied, 'tis Error; but then such Error must appear on the Record.

No Imparlance is allowed in an Homine Replegiando, or in Assise, because 'tis festinum Remedium, unless upon good Cause shown.

INDICTMENT. *See Re-* *stitution, 3.*

The King versus Knight.

1 Salk. 375.
Where the
Charge is not
direct.

(1.) **T**HE Defendant was indicted, for that he being nuper receptor, &c. did falsly endorse twenty Exchequer Bills Quasi receptæ essent pro Custumis, &c. in deceptionem, &c. The Judgement was arrested, for that nuper receptor doth not import, that he was the King's Receiver; then to say falso indorsavit quasi receptæ essent, is no direct Charge of any Thing which is criminal; 'tis true, 'tis said in deceptionem Domini Regis, but that is only Matter of Inference and Conclusion, whereas the Charge contained in every Indictment ought to be so certain, that the Defendant may know what answer to make, and that the Court may set the Fine in Proportion to the Offence; and likewise, that if the Defendant should be indicted again for the same Fact, he may plead Auterfoits convict; 'tis true, the Jury have found, that the Defendant falso indorsavit, but that will not fix a Guilt, for they are only to find the Contents of the Indictment; and if that will not amount to a Crime, the Adverb, falso, will not make it so.

Anony-

Anonymus. Trin. 2 Annæ.

(2.) **T**HE Defendant was indicted, Quare vi & armis centum
oves, &c. cepit, and a Motion was made to quash it,
for that it was no more than an Action of Trespals: But per Cu-
riam, an Indictment will lie for taking Goods forcibly, but then
such Taking must be proved to be a Breach of the Peace; and
tho' the Goods are the Prosecutor's own Property, yet if he take
them in that Manner, he will be guilty.

Indictment
for taking
Goods with
Force.

Anonymus. Trin. 7 Will. III.

(3.) **I**NDICTMENT for Scolding was quashed, because it was not
said to be ad magnam perturbationem pacis Domine Re-
ginae, nor subditorum, or ligeorum suorum.

Indictment
for Scolding
quashed.

The King versus Holliday.

(4.) **T**HE Caption of an Indictment was proborum & lega-
lium hominum de Com' prædict' qui jurati & onerati
super sacramentum suum presentant, quashed, because it did not
set forth, that they were onerati, &c. to inquire for the * King
and the Body of the County.

Indictment
quashed.

* Postea 19.

The King versus Hemmings and Ghent.

(5.) **T**HE Defendants being Overseers of the Poor, were
indicted for refusing to accompt, &c. for the Money
by them received; and upon a Demurrer to this Indictment it
was objected, that it set forth they had collected divers Sums of
Money, but did not say how much, and this made the Indictment
incertain: But Holt Ch. Just. held, that it was not necessary to
set forth how much Money they had received, it being impossible
to charge them with every particular Sum, and the Indictment
is for refusing to come to an Accompt: But a more material Ob-
jection was, that the Indictment set forth, that they & eorum u-
terq; converted the Money to their own Use; but as to that it
was held, that the Cheat of one is the Cheat of the other; but
lastly it was objected, that this Indictment would not lie, because
another Remedy was provided by * the Statute, and of this the
Court doubted.

Indictment
against Over-
seers of the
Poor, for re-
fusing to ac-
compt.

* Postea 15.
S.P.

The King versus Hall. Hill. 7 Will. III.

(6.) **T**HE Defendant was a Constable, and he was indicted Quod cum Humfredus Hall, being a Constable, had seized eighty half-Crowns, which were suspected to be clipped, and refused to deliver them to a Justice of Peace; this was held to be an Offence, but not indictable; besides, the Fact is laid by Way of Recital * Quod cum, &c. and not positively.

* *Antea* Forgery 1.

The King versus Stonehouse. Pasch. 8 Will. III.

Indictment for a private Wrong, not good.
Postea 9. S. P.

(7.) **I**NDICTMENT against Eliz. Stonehouse, for that she intending to deprive Henry Bradshaw of several Sums of Money did falsely and maliciously accuse him of Felony, and of robbing her; this Indictment was adjudged ill, because it was for a Fact not indictable, it not being laid by Way of Conspiracy, so as to make it a publick Crime; and it being only a private Wrong, the Party hath his Remedy by Action on the Case.

The King versus Bakestraw. Pasch. 8 Will. III.

Indictment will not lie at Sessions for Usury.

(8.) **T**HE Defendant was indicted at the Old Baily for Usury, and being convicted, he brought a Writ of Error, and the Judgment was reversed, because the Court of Sessions had no Jurisdiction in this Matter.

The King versus Atkinson.

Indictment for a particular Wrong not good.
Antea 7. S. P.

(9.) **T**HE Mayor of Newcastle, being a Justice of Peace, made an Order, that the Company of Tanners there should admit one Young to be a Freeman of that Company: The Defendant Atkinson, who was Master of that Company, and being served with this Order, refused to obey it, and for this he was indicted: But per Curiam, 'tis not indictable, for 'tis only a Nonfeasance and particular Wrong done to another.

The King versus Savill.

Quashed, for that there was no Caption.

(10.) **A**N Indictment was quashed, because there was no Caption to it.

The King versus Gorge.

- (11.) **T**HE Defendants were indicted at the Sessions held in the City of Worcester, for keeping an open Shop in the said City, not being free thereof, contrary to an immemorial Custom there; quashed, for 'tis not a Matter indictable.

What is not indictable.

The King versus Brown.

- (12.) **T**HE Justices made an Order, that the Defendant should pay Stephen Paine, a Taylor, 7 l. for Work done, which he (the Defendant) refusing to do, was indicted, but it was quashed, for 'tis a Matter not indictable.

What is not indictable.

The King versus Bradford.

- (13.) **T**HE Defendant was indicted for not curing the Prosecutor of an ulcerated Throat, as he had agreed and undertaken to do; quashed, for 'tis no publick Offence, and no more in Effect than an Action on the Case.

Indictment quashed, for that it was not for a publick Offence.

The Queen versus Steer & al'. Trin. 3 Annæ.

- (14.) **T**HE Defendants were indicted, for that they piscerunt, &c. & viginti Carpas de Bonis & Catallis of the Prosecutor, did take and carry away: Per Curiam, the Fish could not be Bona & Catalla of the Prosecutor, unless they were in a Stew-Pond or Trunk, but they might be Pisces suos in a close Pond, and this is ratione loci, because they could not swim away, but they would not quash it upon a Motion.

Mod. Cases 183. Indictment for taking 20 Carps, de Bonis & Catallis suis.

Anonymus. Mich. 2 Annæ.

- (15.) **T**HE Defendant was indicted for Assaulting and Beating a Custom-house Officer in the Execution of his Office, but this Indictment was quashed, because by the Statute 13 & 14 Car. 2. a particular Method of punishing Offenders of this Nature is prescribed, (viz.) By Fine and Imprisonment, by the Justices of Peace: And per Curiam, so it hath been resolved by all the Judges at Serjeant's-Inn, in a Case between the King and Watson.

Offence not indictable, if another Punishment is prescribed by the Statute.

Antea 5. S. P. 13 & 14 Car. 2. cap. 11.

The Par. 6.

The Queen versus Langley. Hill. 2 Annæ.

Mod. Cases
124.
Words spoken to a Magistrate not in Execution of his Office, not indictable.

* 11 Rep. 95.
† 3 Cro. 78, 689.
Moor 247.
1 Vent. 16.

* 1 Sid. 270.
1 Lev. 139.

(16.) **T**HE Defendant was indicted for saying to the Mayor of Salisbury: You Mr. Mayor, I care not a Farth for you; and on another Day, for saying to him, You are a Rogue and a Rascal, and upon a Demurrer to this Indictment it was insisted for the Defendant, that these Words do not appear to be spoken of the Mayor in the Execution of his Office, and therefore this Indictment would not lie; he cannot be * imprisoned for such Words, neither can he be † indicted: Holt Ch. Just. these Words are not indictable, because it doth not appear that the Mayor was in the Execution of his Office, nor that he was a Patent Officer, for it would have altered the Case, if it had appeared that he was a Justice of Peace by Commission from the Queen, for then he would have been indictable, because the Words would have been an Aspersion upon the Queen and upon the Government in general by whom he was employed; but here it doth not appear he was a Justice of Peace, or if he was, it doth not appear that he was so by Commission or Appointment of the Queen, but of the Corporation; 'tis true, if these Words had been written as they were spoken of the Mayor, an Indictment would have laid, for *litera scripta manet*, and there are many Cases which prove, that the same Words, when * written, are actionable, which are not so when spoken: Et per totam Curiam, Words which directly tend to the Breach of the Peace are indictable, as where one Man challenges another to fight, and the Commission of Oyer and Terminer, *de propalationibus Verborum*, is to be understood of Words spoken against the Government, or which amount to a *Scandalum Magnatum*, &c. But for these little Offences contra Bonos mores, the Law has made a proper Provision, and that is by requiring Surety of the Peace, or for the Good Behaviour, and by committing the Offender if he refuse to find such Sureties, or if he speak such Words in Court, they may proceed in a summary Way against him, by fining him for a Contempt of the Court, and by committing him till he hath paid the Fine: Cases cited contra, viz. 1 Cro. 503. 2 Bullst. 139. 3 Mod. 139.

The Queen versus Lane.

Mod. Cases
128.
Indictment for using a Trade quasi'd, because it did not conclude *contra pacem*.

(17.) **T**HE Defendant was indicted on the Statute 5 Eliz. for using the Trade of a Barber, not having been Apprentice to it for seven Years; and a Motion was made to quash it, because it did not conclude *contra pacem*: But per Holt Ch. Just.

Just. There can be no Reason for this Objection, for it would be very hard to make a Barber's Shaving a Ban by Consent, to be contra pacem; besides, 'tis laid to be contra formam Statuti, and therefore this Indictment is good. But per Powell Just. and the other Judges, every Act which is contrary to Law is contrary to the Peace, and a Breach of the Peace: Therefore by the other three Judges contra Holt. Ch. Just. this Indictment was quashed.

Anonymus. Trin. 2 Annæ.

(18.) **T**HE Caption of the Indictment was per Sacrum of the Jury proborum & legalium hominum, &c. jurat' & onerat', without saying impanellat'; and for that Reason it was moved to quash it, but denied per totam Curiam. *jurat' & onerat', and did not say impanellat', yet good.*

The Queen versus Cotesworth. Trin. 3 Annæ.

(19.) **T**HE Defendant was indicted, for abusing Dr. Ratcliff; and it was objected against the Caption, that it was Juratores pro Domina Regina & corpore Com' jurat' & onerat', &c. now it should not be * pro Domina Regina & corpore Com', but pro corpore Com'; but it was disallowed. *Mod. Cases 172. Pro Domina Regina & corpore Com'. * Antea 4.*

The King versus Keate. Hill. 8 Will. III.

(20.) **H**E was indicted upon the Statute of Stabbing, for that he drew his Sword and stabbed James Wells, he having not first struck, but did not say, having not a Weapon first drawn, and concluded contra formam Statuti: The better Opinion was, that the Indictment should set forth, that the Deceased had not a Weapon first drawn. *5 Mod. 287. Upon the Statute of Stabbing, without saying, having a Weapon first drawn, not good.*

The Queen versus Daniel. Hill. 2 Annæ.

(21.) **T**HE Defendant was indicted for enticing an Apprentice to depart from his Master, & seipsum absentare from his Service; it was moved in Arrest of Judgment, that this Indictment was naught, because it did not appear, how long he absented, and there was no Averment, that he did absent; 'tis true, 'tis implied, but 'tis not expressly alledged; and as to the Principal Matter, Holt Ch. Just. held, that the seducing an Apprentice to absent was not indictable, because it doth not affect the Publick. But per Powell Justice, It doth affect the Publick as

as much as the Persuading a Woman to absent from her Husband, because it tends to destroy the first Foundation of Society. But per totam Curiam, This Indictment is naught, for not averring, that the Apprentice did absent; 'tis true, the Word absentare causavit implies, that he did absent, but an Indictment must not only shew the Cause, but the Effect which follows the Cause. And afterwards in Trinity-Term, it was adjudged, that an Indictment would not lie for seducing an Apprentice to leave his Master, but only an Action on the Case; or if it was a forcible taking him away, then an Action of Trespass per quod servitium amisit.

The Queen versus Tracy.

Mod. Cases
30.
Indictment
for perswa-
ding a Justice
of Peace not
to take Bail.

(22.) **T**HE Defendant was indicted, for that he procured one Muriell the Prosecutor to be arrested by a Warrant from a Justice of Peace, &c. and persuaded the Justice to refuse Bail, but did not alledge, that any Bail was offered, and that when Muriell was committed, he (the Defendant) extorted diverse Sums of Money from him, but did not expressly alledge, that Muriell was committed, nor what Sum was extorted from him; and for these Reasons this Indictment was quashed after Verdict; for it being a complicated Offence, the Defendant must be guilty of all or none, but they would not discharge him without he first entered into a Recognisance to appear to a new Indictment; which he did; and afterwards he was indicted de novo, for that he, together with A. and B. intending to oppress Muriell, did in the Parish of St. Giles's in the Fields, in the County of Middlesex, procure him to be arrested pretextu Warranti, and brought him before one Chamberlaine, a Justice of Peace in the Parish of St. Margaret's in the said County, and intending farther to oppress him, persuaded the Justice to refuse Bail, tho' good Bail was offered, and to commit him; and avers, that he was committed, and that Tracy persuaded the Gaoler to lay him (the Prosecutor) in Irons, who by that Means extorted 5 l. from him, &c. Upon Not guilty pleaded, the Defendant was found guilty; and now it was objected in Arrest of Judgment, that here was a Mis-Trial for the Venire was only from the Parish of St. Giles's, whereas the Fact did arise from the Parish of St. Margaret's, as well as from the Parish of St. Giles's. And per Curiam, this is a plain Mis-Trial, but yet the Defendant hath forfeited his Recognisance, because he was to try the Cause with Effect, that is so as the Court may proceed to Judgment; and if Defendants will make such Faults on Purpose, their Recognisances shall be estreated, or a Scire facias shall be brought thereon in this Court; for B. R. may take either Course, unless the Defendant will enter into a Recognisance

cognisance, to try it again De novo, which accordingly was done, and the Defendant was tried and found guilty again; and it was insisted for him in Arrest of Judgment, that his Persuading Mr. Chamberlaine the Justice, to refuse Bail, was only Matter of Opinion, and that the Extortion was not by the Defendant, but by the Goaler; so that there was no Offence charged in this Indictment against the Defendant, for the rest is only taking a Man upon a lawful Warrant, which is no Crime. But per Holt Ch. Just. he is guilty even of the Oppression and Extortion committed by the Goaler, because he procured him to be wrongfully put into the Goal; for if W. R. wrongfully imprisoneth W. W. and the Goaler detains him till so much is paid, in such Case, he who was the Prisoner shall have an Action of False Imprisonment against W. R. for imprisoning and detaining him until he paid so much Money; and this is a Taking by W. R. and it must be illegal to use any unlawful Means to oppress another. It was held in this Case, that wherever a Justice of Peace may by Warrant arrest a Person, he hath Authority to Bail, and that before any Indictment found, the Justice may grant a Warrant for apprehending a Man for a Misdemeanour, and bind him to the Peace, or over to the Sessions.

In the Case above mentioned it was held, that where the Defendant is indicted, he cannot send a Plea into the Office, without giving Security to try it at his own Charge; but if he come into Court, he may put in his Plea, and the Court is bound to receive it, but then he must be committed, unless he give Security to try it; and if he chooses to be committed, then the Trial must go on at the Charge of the Prosecutor, but if he give Security, the Trial must be at his own Charge.

The King versus Cross. Hill. 13 Will. B. R.

(23.) **T**HE Defendant was indicted for buying stolen Goods, knowing them to be stolen; and upon Not guilty pleaded, he was convicted; and it was moved in Arrest of Judgment, that by the Statute the Buyer is made Accessary to the Felony, for which he ought to be indicted, and not for a Misdemeanour or Trespass, as he was in this Case, and so it was adjudged; for per Holt Ch. Just. at Common Law this Offence was more than a Trespass, it was Evidence as an Accessary not present, but after the Fact was done.

Indictment
for buying
stolen Goods;
knowing
them to be
stolen.

The King versus Summers.

1 Lev. 139.
Indictment
at the Sessions, for
Writing a
scandalous
Letter.

(24.) **T**HE Defendant was indicted at the Sessions, for Writing a scandalous Letter to one Mellich concerning a young Woman, whom he intended to marry: Upon Not guilty pleaded, he was found guilty, and afterwards he brought a Writ of Error, and the Error assigned was, that this was a private Letter, for which he was not punishable by Way of Indictment; or if an Indictment would lie, yet not before the Justices of Peace in their Sessions. Sed per Curiam, this is an Offence, and indictable before the Justices in Sessions, because it tends to the Breach of the Peace.

Raym. 276.
Indictment
for Felony, in
running away
with
Goods, &c.

Adjudged, That where a Person came to a Seamstress's Shop, and asked her to shew him some Linen, which she did, and delivered it into his Hands, and then he run away with it, that this is Felony; for tho' the Goods were delivered by the Owner, yet they were never out of her Possession, because, tho' the Contract might be begun, by asking and telling the Price, yet it was not perfected, and the subsequent Act of his running away doth plainly shew his Intention to take the Goods feloniously before the Property was altered; for which he was indicted, convicted and executed.

Sid. 254.
Raym. 276.
Indictment
for using the
Process of
the Law to
a felonious
Purpose.

So where a Man, who had no Manner of a Title to an House, brought an Ejectment, and procured an Affidavit to be filed of the Delivery of the Declaration to the Tenant in Possession, and for want of appearing and Pleading, got Judgment at his own Suit and then sued out an Habere facias Possessionem, and got a Warrant thereon from the High-Bailiff of Westminster, directed to one of his Bailiffs, who, with the Plaintiff himself turned the Defendant out of Possession, and seized all the Goods, and converted them to his own Use; this was adjudged Felony, for which he was indicted, convicted and executed, for he made Use of the Process of the Law, with a felonious Purpose.

Induction and Institution.

(1.) **P**ATRONS did originally fill all Churches by Collation and Livery, as they do now to free Chapels, till this Power was extorted from them by Canons. Seld. Tithes. Ch. 6. Par. 2. Ch. 9. Par. 4.

(2.) Where the Archdeacon makes a Mandate for Induction, if 'tis executed by one who is not resident within the Archdeaconry, yet 'tis good. Noy 134.

(3.) Morgan was admitted and instituted to a Benefice, afterwards one Glover was presented, admitted, instituted, and inducted, then Morgan was inducted; then R. R. the King's Presentee was inducted and entered upon Morgan, and Glover entered; and the Question was, whether R. R. or Glover had the better Title: Et per Curiam, Morgan being instituted, that was a Plenarty against any common Person, therefore the Induction of Glover was void, and he had but a meer Possession, which was defeated by the Induction of R. R. the King's Presentee, and likewise by the Induction of Morgan, who had the first Right, so that each of them hath a better Right than Glover, therefore R. R. may maintain an Escrement against him. Institution alone without Induction is a Plenarty against a common Person. 1 Roll. Reps 191.

I N F A N T S.

Anonymus.

(1.) **I**T was held, that an Infant cannot be a Parson, Juror, Attorney, Bailiff, or Member of Parliament, but he may be a Mayor, Sheriff, Gaoler, or Steward of a Court, by Descent, What Officer he may be, what not. but

but not by Purchase, unless granted to him in Reversion, or ad exercendum per se vel deputatum suum.

What Leases made by him are void and voidable.

(2.) That his Lease which he makes, without reserving any Rent, is void; if Rent is reserved, 'tis voidable, and so is a Lease made to him; but his Lease of Ejectment is good.

What Contracts made by him are good, what not.

(3.) That all Contracts for Necessaries, and which concern his Person, are good, as for Debt, Apparel, Physick, or Learning, &c. But 'tis otherwise if the Contracts do not concern his Person, as if 'tis to repair his House, or to carry on his Trade, neither shall his Contract to be an Apprentice bind him, unless in London, and there 'tis good by the Custom.

(4.) Money borrowed for Necessaries binds him, if he apply it accordingly; but if misapplied, then his Contract is not binding.

(5.) All Acts of Necessity bind him, as Presentations to Benefices, Admittances and Grants of Copyholds, and assenting to a Legacy.

(6.) All his Acts which have no Colour of Advantage to him, or which are without any Consideration, are void, but his Feoffment is only voidable, unless Libery is made by Attorney, and then 'tis void.

(7.) A Judgment by Default, after his Appearance per Guardianum, shall bind him, but not if he never appear, or if he doth appear in Person and make Default.

How he must sue and be sued.

* Jones 177.

(8.) He cannot answer but by Guardian, but he may sue either by Prochein Amy or by Guardian; and his Suit by Prochein Amy is by * the Statute, and that is where he sues his Guardian, or where his Guardian will not sue for him.

(9.) His Acts in Pais, as Feoffment or other Deeds, may be avoided by Plea or Entry, after or before he is of full Age, and so may his Deed of Bargain and Sale; but his Acts on Record, as his Fine levied, Recovery suffered, or Statute acknowledged, must be avoided by Writ of Error or Audita querela during his Nonage.

For what he is punishable.

(10.) He is punishable for permissive Waste, for Escapes, for Perjury, for not coming to Church, for Cheating with false Dice, for Batteries, for Slander, &c.

Ellis versus Ellis. Hill. 9 Will. III.

- (11.) **A** Sumpsit against an Executor for Money lent to his Testator; the Defendant pleaded, that his Testator was an Infant; the Plaintiff replied, that the Money lent was for Necessaries, and good; for an Infant is chargeable for Money lent, if 'tis laid out for Necessaries, according to his Degree, but all that is at the Peril of the Lender.

5 Mod. 368.
See 1 Salk.
386. Earle v.
Peale.
He is charge-
able for Mo-
ney lent to
buy Necessa-
ries.

Williams versus Harrison. Trin. 3 Will. III.

- (12.) **A** Judged, that if an Infant accepts a Bill of Exchange, he may plead Infancy upon an Action brought against him, because the Custom of Merchants is Part of the Law of the Land; and 'tis not a local Custom, as in London, for an Infant to bind himself Apprentice, &c.

He may
plead Infan-
cy to the Ac-
ceptance of
a Bill of Ex-
change.

Score versus Bowles. Mich. 2 Will. III.

- (13.) **I**n Replevin against three, they all made Cognisance by Attorney, and Judgment being given for the Plaintiff, a Writ of Error was brought in B. R. and the Error assigned was, that one of the three Defendants was an Infant, but it was disallowed; for per Holt Ch. Just. this Matter was plead-able in Abatement, and therefore not assignable for Error.

Where In-
fancy is
pleadable in
Abatement,
it shall not be
assigned for
Error.

I N-

INFORMATION.

The King versus Roberts. Pasch. 4 Will. III. B. R.

Information
not good for
the Incert-
tainty.

(1.) **I**nformation against a Common Ferryman, setting forth the accustomed Rates to be, (viz.) for the Passage of a Man and Horse, one Penny, for a Score of Oxen 7 d. for a Score of Sheep 2 d. &c. and that the Defendant being the Ferryman, from such a Day to such a Day, did take of several of the King's Subjects, unknown, divers Sums of Money exceeding those antient Rates, (viz.) for the Passage of one Man and a Horse 2 d. for every Score of Oxen 12 d. &c. Upon Not guilty pleaded, the Defendant was found guilty, but * the Judgment was arrested for the Incertainty as to what the Defendant did take, and of whom, and of how many Persons, for every Taking was a separate Offence.

3 Bulst. 317.
2 Cro. 324.
2 Leon. 38.
1 Roll. 80
1 Mod. 188.
Postea 6.

The Queen versus Tayler. Pasch. 2 Annæ, B. R.

Information
for speaking
treasonable
Words of the
Dead.

(2.) **I**nformation against the Defendant, setting forth, that he on the 30th Day of January, proditorie, spoke these Words, (viz.) King Charles the First was rightly served in having his Head cut off, and it was a Pity that his two Sons, Charles and James were not served so too; in contemptum Gulielmi tertii nuper Regis, legumque suarum, & ad malum exemplum omnium aliorum in hujusmodi casu delinquentium, ac contra pacem dicti nuper Regis, &c. Upon Not guilty pleaded, the Defendant was found guilty; and it was moved in Arrest of Judgment, that these Words were spoken of the Dead, and they are not averred to be spoken with an Intention to prejudice the Government, and they are not aggravated by the Word Proditorie, because that is applicable only to Treason, which this is not: Sed per Curiam, these Words affect the Living, tho' they were spoken of the Dead, and they advance a Commonwealth Principle contrary to Law, and therefore there needs no Averment, that they were spoken with an Intention to injure the Government, for the Words import a Crime of themselves, and endanger the Queen and Monarchy; and tho' * the Crime is only a Misdemeanor, yet the

* See Cro.
Car. Hugh
Pines's Case.

Word Proditorie is proper in this Information, because this Misdoemeanour has a Tendency to Treason, and shews a treasonable Intent in the Speaker. He was fined forty Marks, being but a poor Tanner, and to stand twice in the Pillory.

The Queen versus Holford.

(3) **I**nformation against the Defendant for Subornation of Perjury, setting forth, that whereas in Curia Domini Regis coram ipso Rege apud Westm' in Com' Middlesex one Rhodes nuper de D. in Com' Surrey, Datmeal-maker, had impleaded the Defendant Holford, for that whereas he was indebted to the Plaintiff in the Parish of St. Clement's Danes in Com' prædict', and promised to pay, &c. and that, whereas upon an Accompt stated between them, the Defendant was found in Arrear, &c. and promised to pay, &c. and the Defendant pleaded Not guilty; and at the Trial did procure one W. R. to swear, that he was present at the Stating the said Accompt, &c. whereas in truth, he was not present, &c. To this Information the Defendant pleaded Not guilty, and the Cause being tried at the Nisi prius in Middlesex, he was found guilty; and it was moved in Arrest of Judgment, that the Fine would be entire, and therefore, if either of the Assignments was naught, no Judgment could be given; but this Objection was disallowed, and thereupon another Objection was made (viz.) that the Cause of Action being laid in Surrey, it could not be tried in Middlesex, and here the Cause of Action was laid in Surrey; 'tis true, 'tis said, that the Defendant was indebted to the Plaintiff in the Parish of St. Clement's Danes in Com' prædict', which must be in the County of Surrey, because that was the County last named, and therefore it must relate to that County, which is very true (viz.) Ad proximum antecessens fiat relatio; but that Rule hath an Exception (viz.) nisi impediatur sententia, as it plainly doth in this Case.

where a Thing shall relate to the last Antecedent, where not.

The King versus Gall. Hill. 10 Will. III. B. R.

(4.) **T**he Defendant bought and sold live Cattle in the County of Norfolk, not having kept them so many Weeks as required by the Statute * 5 & 6 Ed. 6. and thereupon an Information was brought against him in B. R. in Middlesex. And per Holt Ch. Just. who said ten Judges had resolved these Points.

1 Salk. 372. Where Prosecutions on Penal Statutes must be in proper Counties. * Cap. 14.

(1.) That the Statute * 21 Jac. 1. did not extend to any Offences created by subsequent Penal Statutes, so that Prosecutions

* Cap. 4.

on such Statutes are not restrained to the proper County; but that Informations upon Penal Statutes made before that Act 21 Jac. 1. must be brought in the proper County where the fact was done.

* Cap. 4.

(2.) That an Action of Debt upon the Statute * 5 Eliz. for using a Trade, not having been Apprentice to it for seven Years, must be brought in the proper County where the Offence was committed, and not in B. R. unless the fact was done in that County where the King's Bench sits, and then the Action may be brought in Middlesex; and Holt Ch. Just. denied the Case of * Barnes and Hughes to be Law, which is reported in many Books.

* 1 Vent. 5.

Who shall
be a Com-
mon Inform-
er, and who
not.

(5.) Debt upon the Statute 23 H. 6. against the Mayor of Dorchester for a false Return of a Burgess to Parliament, by which Statute 40 l. is given to the King and 40 l. to the Party grieved, and not returned, so as he sue for the same within three Months after the Beginning of the Parliament, or to any other Person, who in Default of him so chosen shall sue for the same: The Person chosen did not sue within the three Months, but the Prosecutor after the three Months, and before the End of one Year next following, sued out a Latitat, but not within a Year after the Offence: The Question was, whether he should be taken to be a Common Informer, and so by the Statute 31 Eliz. ought to bring his Action within a Year after the Offence, which was not done in this Case; for the Latitat was sued within a Year after the End of three Months, in which Time the Party grieved was allowed to bring his Action. The better Opinion was, that he was no Common Informer, because there was no Time limited by the Act when the Prosecutor should bring his Action; he stands now in the Place of him who should have brought his Action within three Months, and he was no Common Informer; if he had brought his Action for the whole 80 l. tam pro Domino Rege quam pro seipso, he had been within the Statute; the Plaintiff had Judgment. But per Holt Ch. Just. a Latitat cannot be a Commencement of a Suit upon a Penal Law, 4 Mod. 129. Culliford versus Blandford. at the King's Pleasure: This Statute is confirmed by 20 Rich. 2. cap. 1. with an additional Punishment, viz. a Fine to the King upon a Trial at Bar, the Defendant was acquitted. 3 Mod. 117. Sir John Knight's Case.

Antea 1. S. P.

(6.) Information against the Defendant for Extortion, setting forth, that there is a Common Passage and Ferry-Boat, for transporting People and Cattle, at such Rates, setting them forth; and that the Defendant being a Common Boatman, did carry

carry at several Times several Persons, and several Score of Sheep, and that during that Time he did extort de quibusdam ignotis, for the Use of the said Boat in transporting, (viz.) pro transportatione cujuslibet equi 2 d. Et pro quibuslibet viginti ovibus 4 d. & sic secundum ratam; after a Verdict for the Informer, it was moved in Arrest of Judgment, that the Information was ill, because 'tis not said from whom he extorted those, but only de quibusdam ignotis, and no particular Time is mentioned when he extorted, nor how many Score of Sheep were carried over. Et per Curiam, every Taking is a several Offence, and if this Information should be good, it may as well be said, that an Indisment for Battery will be good, setting forth, that he beat so many of the King's Subjects between such a Day and such a Day; the Judgment was reversed. 4 Mod. 100. The King v. Roberts.

I N H I B I T I O N.

Lunne *versus* Dodson. Pasch. 13 Car. B. R.

(1.) **A**N Inhibition is either hominis or juris; 'tis ne visitationem facias, vel aliquam jurisdictionem Ecclesiasticam contentionem vel voluntariam habeas: Thus when an Archbishop visits, he inhibits the Bishop, when a Bishop visits, he inhibits the Archdeacon; and the Reason is to prevent Scandal and Distraction, and this continues till the Relaxation of the Inhibition, which is not till the last Parish is visited, and then 'tis entred nulla Parochia restat visitanda, for he may hear of no Faults till he come to the very last Parish.

The Effects
of an Inhi-
bition.

(2.) Now after such an Inhibition upon a Metropolitcal Visitation, if a Lapse happens, the Bishop cannot institute, because his Power is suspended, and therefore the Archbishop is to institute; for 'tis not only Penal in the Bishop so to do, but the

D d

Insti.

Institution itself is void, because 'tis an Act of Jurisdiction from which he was suspended.

(3.) But it may be a Question, in the Case of a Collation, whether, if a Lapse happen the Bishop may collate, because 'tis a Kind of Title; but the better Opinion is, he cannot, because 'tis not by Way of Interest, but by Way of Provision for the Cure, and to supply the Negligence of the Patron; this appears, because the Patron may present at any Time after a Lapse, and before Collation.

INNUNENDO. *See* Libell, 4.

Joinder in Action.

Who may
join in an
Action.

(1.) **A**Djudged, That where two or more receive a joint Damage, they may join in an Action; as where two Churchwardens brought a Mandamus to the Official to swear them, who refused and made a false Return, they may join in a Suit against him for such false Return; but where the Damages are several, the Parties cannot join.

Where the
Action must
be several,
and not joint.

(2.) A. owed 20 l. to B. as Executor, and 10 l. more in his own Right, one Action will not lie against him for the whole Money, because there must be several Judgments.

6 Rep. 87.
1 Vent. 223,
366.
What Ac-
tions may be
joined, and
what not.

(3.) An Action on the Case and an Action of Trespass, or Case and Trover, may be joined in one Action, because the Foundation of both are on a Wrong, and Not guilty is a good Plea to the Whole; but Assumpsit & Trover cannot be joined, because there must be different Pleas.

(4.) Case and Trover was brought against a Carrier for Money Sid. 245. delivered to him, this was adjudged ill after a Verdict, because 'tis not founded on a Wrong alone, but on the Custom of the Realm, and a general Verdict could not be given.

(5.) The Lessor made a Lease to W. R. who covenanted to repair, afterwards the Lessor assigned one Moiety of the Reversion to B. and the other Moiety to C. adjudged, that both of them may join in one Action of Covenant against W. R. the Lessee for not repairing, for 'tis no more than a personal Action to recover Damages, in which Tenants in Common may join. 1 Lev. 167. Sid. 157. Raym. 80. Where two may join in one Action.

(6.) In Actions personal, where a Tort is by Common Law and a Tort by Statute, they cannot be joined; so 'tis where a Contract is by Common Law and by Custom. What Actions may be joined, what not.

(7.) But where several Torts are by Common Law, they may be joined, if personal; as for Instance, Trespas for several Trespases, or Trespas and Case.

(8.) So where several Contracts are by Common Law, as Debt upon several Bonds; Debt upon a Mutuatus and Judgment, or Debt for Rent and Indebitatus for Money lent; for tho' one Plea will not answer both, as in an Action of Debt upon a Judgment and upon a Mutuatus, yet there is the same Process and Judgment, but 'tis not so in Torts and Contracts, for the Process and Judgment are not the same.

Boson *versus* Sandford. Hill. 2 Will. III. B. R.

(9.) CASE, &c. in which the Plaintiff declared against six Defendants, setting forth, that he loaded a Ship whereof they were Owners, and that they undertook the Goods should be carried safely, but that by their Negligence the said Goods were damaged by fresh Water; upon Not guilty pleaded it appeared at the Trial, that there were more Part-Owners of this Ship than these six Defendants, and because all the Part-Owners must be equally liable, the Action being quasi ex contractu, the Court held, that the Defendants should take Advantage of it in Evidence; for where the Plaintiff brings an Action on the Case, he ought to declare according to the Truth of his Case; and if the Jury find a Contract made by more than against whom the Plaintiff had declared, 'tis a Variance, and if this had been pleaded in Abatement with a Traverse, Absque hoc quod super se D d 2 Assumpsit

204 Jointenants and Tenants in Common.

Assumpsit tantum, it had been ill, because 'tis no more than the General Issue.

Dalson *versus* Tyson. Trin. 7 Will. III. B. R.

5 Mod. 90.
1 Salk. 10.
Vent. 233.
Assumpsit and
Trover can-
not be join-
ed.

(10.) **T**HE Plaintiff declared against a Common Carrier, and one Count was in Assumpsit, and the other was in Trover; this was adjudged ill after a Verdict, for the one sounds in Contract and the other in Tort; the like Case is 1 Sid. 244. but ill reported: Et per Holt Ch. Just. Tenants in Common may either join or sever in Debt, but in Abowry they must sever, because it goes to the Realty, therefore if three Tenants in Common distrain three Beasts, each of them must abow for one Beast.

Jointenants and Tenants in Common. See Joinder in Action 10.

The Serjeants Observations on this Title are chiefly what was said by Holt Ch. Just. in *Fisher* and *Wiggs's* Case herein after mentioned.

What makes
a Tenancy
in Common
and what a
Jointenancy.
* 1 Roll. 441.

(1.) ff. **W**here there are two Jointenants for Life, each of them hath an Estate for his own Life and for the Life of his Companion; and for that Reason, if one of them makes a Lease, it shall continue not only during the * Life of the Lessor, but after his Death, during the Life of his Companion; for the Lease, which is only derivative, shall continue as long as the original Estate out of which it was derived.

Jones 55. in
Eustace's
Case.

(2.) But this seems contrary to another Resolution, where it was held, that he hath only an Estate for his own Life, and a

Possibility of surviving his Companion to be entitled to his Part; and therefore if he grant over his Estate, that Possibility is gone, and if he die, the Estate of the Grantee shall revert to him in the Reversion.

(3.) Goods, or a Term for Years devised to two equally, makes a Tenancy in Common and not Jointenants, because an equal Benefit is intended to both, which cannot be if all must survive to one; but Lands to two equally makes a Jointenancy, for having them for Life there is no Inequality between them; but a Devise to two equally and to their Heirs makes a Tenancy in Common, because the Word Heirs would be in vain if they were Jointenants. 3 Cro. 697.
Dyer 25.

(4.) So a Devise to Two, Part and Part alike, they are Tenants in Common and not Jointenants, for there can be no Parties between Jointenants: * But a Devise to two equally to be divided by W. R. they are not Tenants in Common till after the Division is made. * Gouldf. 183.

(5.) Devise to his two Sons, and to the Heirs of their Bodies, but that his Executors shall enjoy it till they come to their several Ages; the Sons are Jointenants for Life, because the Estate hath several Commencements, for each may enter at his full Age, but not to gain an Estate, but only the Possession and Profits. * 2 Cro. 259.
Vcl. 183.
1 Bulst. 42.

(6.) * Devise to Two, equally to be divided, and to the Survivor, they are Jointenants by Vertue and Force of the last Word. * Vent. 216.

(7.) * Where a Bond is made to Two, the Obligees are Jointenants, and the Survivor shall have the Bond and the Duty; so of Covenants, Debts, and Contracts at Common Law. * 1 Inst. sect. 282.

(8.) Three were Jointenants of Goods, and two of them brought an Action of Trover, without the other; adjudged, that the Defendant might plead this Matter in Abatement; but if he plead Not guilty, the Plaintiffs shall not be nonsuit, tho' this Matter appears upon Evidence, but shall recover Damages for their two Parts. 2 Vent. 113.

(9.) One Jointenant granted, bargained and sold all his Estate and Interest to the other; adjudged this is a good Conveyance, and shall pass his Moiety to his Companion, for the Word Grant amounts to a Release, Confirmation and Surrender, as well as to a Gift, but then the Party must plead it as a Release, for one Jointen-

1 Vent. 78.
2 Saund. 96.

Jointenant cannot grant to another, therefore he must plead quod relaxavit, and not quod concessit.

(10.) Two Tenants in Common. W. R. brought Trespass against one of them; adjudged, that he may plead in Abatement, that he is Tenant in Common with another, but if he pleads Not guilty, he cannot give it in Evidence.

1 Vent. 214.
2 Lev. 113.

(11.) And yet if one Tenant in Common bring an Action of Trespass against another, the Defendant may give it in Evidence; the Law is the same between Jointenants.

Noy 157.

(12.) Two Jointenants for Life, one made a Lease for ninety-nine Years, to commence after his Death, if the other should so long live; the other surrendered: Et per Curiam, the Lease is good in Point of Creation, and shall continue, tho' the Lessor dies, if the Jointenancy had continued; but that being severed by the Surrender of the other, there can be no Survivorship; and therefore the Lease will determine by the Death of the Lessor, for his Lease as to Survivorship depends upon the Continuance of the Jointenancy; which was only a meer Possibility, and is now destroyed, and by Consequence the Lease is so too, and so it would have been if they had made Partition; but it had not been so if both of them had joined in the Lease, and afterwards had made Partition or surrendered.

Fisher versus Wigg. Hill. 12 Will. III.

1 Salk. 391.
Surrender to
the Use of
his Children,
equally to be
divided, and
to their
Heirs re-
spectively,
makes a
Jointenancy.
* Yel. 23.
Dyer 10.

(13.) **T**HE Case was, A. The Father being seised of a Coppyhold of Inheritance, surrendered the same to the Use of his five Children, equally to be divided, and to their Heirs respectively; the Question was, whether they were Jointenants or Tenants in Common: And per Gould and Turton Justices, they are Tenants in Common, because the last distributive Words (viz.) and to their Heirs respectively, shew, that it was the Intent of the Surrenderor it should be so, which, in the Case of a Coppyhold and of an * Use ought to be pursued: But per Holt Ch. Just. They are Jointenants; as to this Estate being Coppyhold, that is not to be regarded, for that will no more pass by improper Words than other Estates, and this is not properly an Use, for there is no Cestui que Use in this Case, nor any Statute Operation, but the Surrenderees are in from the Lord of the Manor, and the Surrender to the Use of such Persons shews only the Intention of serving such Estates and Limitations, so that this Use is no more than a Gift to five Children, equally to be divided, and that is a Jointenancy and not a Tenancy in Com-

mon, and for these Reasons following; First, because the Words Equally to be divided, import no more than the precedent Words implied (viz.) that the Children should have all alike, which they cannot have if they are not Jointenants. Secondly, the Words, Equally to be divided, doth not make them Tenants in Common; because, as Tenants in Common they must be seised pro indiviso, as to the Possession, whereas those Words, divide their Tenancy and Possession, and whenever the Estate comes to be divided, they cease to be Tenants in Common; therefore 'tis absurd to say, that those Words create an Estate in Common. And lastly, Jointenancy is favoured in Law, which neither loves Fractions or Divisions of Estates; but if this was a Tenancy in Common, then the Tenements and Tenures would be multiplied, for here would be five Copyhold Estates, and five Fines to the Lord of the Manor, instead of one before.

Pullen *versus* Palmer. Trin. 8 Will. III.

(14.) **I**N Replevin for taking several Cattle, the Defendant avowed in his own Right, for that W. R. was seised in Fee of, &c. and granted a Rent-Charge to A. B. and C. and ten more, who granted to the Defendant and to twelve more, and that four of the said thirteen are since dead, and nine alive, of whom he is one, and that for one Year's Rent, due at such a Time, he distrained: Upon a Demurret to this Plea it was objected, that the Defendant ought not only to justify in his own Right, but that he ought likewise to make Conscience as Bailiff to the Rest, who were living: Et per Holt Ch. Just. one Jointenant may distrain, but he cannot avow solely, and therefore this Avowry must abate, because 'tis always upon the Right, and the Right of this Rent is in all of them; and therefore the Court cannot adjudge the Right of the Return' Habend' to one alone; for which he (the Defendant) ought to have made Conscience, as Bailiff to the Rest; and this is like a * Repleader, where the Defendant may avow de novo. Tenants in Common may join or sever in Debt, but they must sever in Avowry, for the Reason before mentioned (viz.) because it goes to the Realty; and therefore, if three Tenants in Common distrain thirty Beasts, one of them must avow for ten, the other for ten, and the third for ten more. But per Curiam, * the Husband may distrain for Rent due to his Wife, and avow for it alone, because the Right of the Rent due is in him alone.

5 Mod. 71.
150.
One Jointenant may distrain, but cannot avow alone.

* Inf. 146, a.

* 2 Cro. 282.

(15.) The essential Difference between Tenants in Common and Jointenants is, that Tenants in Common hold their Lands either by several Titles or several Rights, but Jointenants hold them

The Difference between Tenants in Common and Jointenants.

them by one Title and by one Right ; but there is no Difference between them as to the Possession, and the Manner of taking the Profits.

Tenants in Common not compellable to make Partition. Co. Ent. 413.

(16.) Tenants in Common were not compellable at Common Law, before the Statute, to make Partition, no more than Jointenants ; and per Holt Ch. Just. in suing out a Writ of Partition, the Party never shews, whether he is a Tenant in Common or Jointenant.

ISSUES JOINED.

2 Lev. 12. Where the Day and Place is made Part of the Issue, 'tis not good. See Postea 6.

(1.) **I**N Replevin the Defendant avowed for Rent Arrear upon a Lease made to him 1. Octob. 11 Regis apud F. The Plaintiff in Bar replies, that the Avowant did not make the Lease to him on the said 1. Octob. 11 Regis apud F. in Manner and Form, &c. and upon Demurrer to this Replication, per Curiam, the Day and Place are here made Part of the Issue, whereas they are not material, for a Demise at any other Time and Place would be sufficient ; he should have replied, non demisit modo & forma.

3 Lev. 170. In Covenant, &c. where nil debet is no good Plea.

(2.) In Covenant upon a Lease, the Breach assigned was for Non-payment of Rent ; the Defendant pleaded nil debet ; adjudged upon a Demurrer to be an ill Plea.

1 Vent. 213. There must be a Negative and Affirmative, to make an Issue.

(3.) The Plaintiff sued as Administrator ; the Defendant pleaded, that W. R. was Administrator, and yet alive ; the Plaintiff replied, that W. R. was not alive, and concluded to the Countrey ; and upon a Demurrer to this Replication, it was adjudged ill, for tho' the Matter is Contradictory, yet there must be a Negative and an Affirmative to make an Issue.

Raym. 98. Where the Plea, hoc paratus est verificare, is not good.

(4.) Debt upon Bond conditioned to pay all such Sums as should be expended in such a Matter ; the Defendant pleaded Payment, & hoc paratus est verificare ; the Plaintiff replies Non-payment, & hoc paratus est verificare, and upon a Demurrer to this Replication it was adjudged ill, for he ought to have concluded to the Countrey.

(5.) IN Debt upon Bond conditioned to render an Accompt of all such Goods of W. R. as came to his Hands; upon Oyer the Defendant pleaded, that no Goods of W. R. came to his Hands, and averred his Plea; the Plaintiff replied, that a Silver Bowl of W. R.'s came to his Hands, and he likewise aver'd his Replication. Et per Curiam, 'tis well concluded, for the Matter is *new; but if it had been expressed in the Condition, then he ought to have concluded his Replication, & hoc petit quod inquiratur, &c. but here it was out of the Condition, and perhaps the Defendant may have new Matter to rejoin; as, that the Bowl was given to him, &c. But 1 Sid. 341. is denied to be Law.

1 Sand. 112.
Where hoc paratus est verificare is a good Plea.

* Postea 1c.

Yates *versus* Herlakenden. 9 Will. III. B. R.

(6) IN Covenant against an Apprentice; the Breach assigned was, that he (the Defendant) penitus decessit from his Service at such a Time, & abinde continue to such a Time; the Defendant pleaded, that he did not depart from his Service, and continue from it as the Plaintiff had alledged; to which Plea the Plaintiff demurred, because the whole Time being put in Issue, the Defendant ought to have pleaded, he did not continue out of his Service for the Time alledged in the Declaration, nor for any Part thereof.

See *Antea*. 1.
Where the whole Time is put in Issue.

Holt, Ch. Just. In a General Issue, as Masse for cutting twenty Trees, the Defendant must plead, that he did not cut the said twenty trees, nor any of them; but 'tis otherwise in a Collateral Issue; as for Instance, in an Action of Debt, upon a Bond conditioned not to commit Masse, and the Breach assigned, that he did commit Masse in cutting twenty Trees, 'tis sufficient for the Defendant to plead he did not cut twenty Trees modo & forma, as the Plaintiff hath alledged, for in such Case he is only to meet with his Adversary; but upon the Evidence, if it appear that he cut down one Tree, the Plaintiff shall have a Verdict.

3 Cro. 84.
Dyer 115. B.
1 Inst. 282.

Hall *versus* Stich. 5 Will. III. B. R.

(7.) IN Ejectment for Lands in the County Palatine of Durham: Upon Not guilty pleaded, the Plaintiff had a Verdict; and upon a Writ of Error brought, the Error assigned was, that there was no Issues joined between the Parties, for the Words *super patriam* were left out; but per Curiam, here is an Affirmative and a Negative, and that makes an Issue; 'tis true, it

Where the Words *super patriam* were left out the Issue is only informal, there being an Affirmative and Negative before.

it had been better if those Words had been in, but the Omission of them only makes the Issue informal, so they affirmed the Judgment.

Skinner *versus* Kilby. Mich. 1 Will. III. Intratur.
Trin. 1 Will. III. Rot. 833.

Where *hoc parat' est verificare* is not good.

* Yelv. 138.
Cro.Car. 164.

(8.) **I**N Covenant, the Plaintiff assigned a Breach, in Non-payment of Rent; the Defendant pleads, that he paid it, & *hoc paratus est verificare*; and upon a Demurrer to this Plea, it was adjudged ill, because it was an Affirmative to what went before, for that was a Negative (*viz.*) in Non-payment of Rent, and therefore the Defendant ought to have concluded to the * Country, for otherwise Pleadings would be Infinite.

Allen *versus* Symms. Trin. 6 Will. III. Rot. 299.

Where one Affirmative is in Answer to another, it ought to be averred, and not to conclude to the Country.

(9.) **I**Ndebitatus Assumpsit against Richard Symms, who pleaded Quod ipse idem Richardus *versus* quem, &c. is called Richard Symonds, and traversed, that he is called Richard Symms, & hoc, &c. The Plaintiff replied, that the Defendant was called and known as well by one Name as by the other, & *hoc paratus est verificare*; and upon a Demurrer to this Replication, per Curiam, the Defendant may well enough say, that ipse idem Richardus is called Richard Symms, for he may own his Christian Name, and plead a Misnomer to his Surname.

But in this Case all is discontinued by the Plaintiff's Replication, because he averred his Plea, when he ought to conclude to the Country. Sed per Curiam, where one Affirmative comes in Answer to another Affirmative, in such Case it ought to be averred, and not conclude to the Country; but 'tis otherwise, where an Affirmative comes in Answer to a precedent Negative; therefore in this Case the Defendant having added a Traverse to his Plea, the Plaintiff ought to have concluded his Replication to Issue (*viz.*) * to the Country; for in Pleas the Traverse is as a Negative, and every general Negative must conclude to the Country: So that in this Case the Misconclusion of the Replication had made a Discontinuance.

* Dyer 353.
2 And. 6.
Yelv. 138.
Thomp. Ent.
1. No. 4.
Rast. Ent.
515, 516.

Loder *versus* Loder. Mich. 2 Will. III. B. R.
Rot. 506.

(10.) **D**EBT upon Bond against an Administrator cum Testamento Annex'; the Defendant prayed Oyer of the Condition, which was, that W. R. should not reboke his Will and pleaded, that the said W. R. did not reboke his Will; the Plaintiff replied, that after the said Will the said W. R. made another Will, and thereby he did reboke the first Will, & hoc paratus est verificare; and upon a Demurrer to this Replication it was adjudged, that tho' this is an Affirmative to a precedent Negative in the Plea, yet the Plaintiff needs not conclude to the Country in his Replication, but aver it as he had done, because in the Replication * new Matter was suggested, and therefore he ought to conclude & hoc paratus est verificare.

Where there is an Affirmative to a Negative, yet if the Matter is new, it needs not be concluded to the Country.

Antea 5. S. P.

Watts *versus* West. Pasch. 12 Will. III.

(11.) **A**ction against the Mayor for a false Return, &c. the Practice was agreed to be, that where the Defendant pleads the General Issue and 'tis not entered, he may within four Days of the Term waive that Issue and plead specially, and if Sunday happen to be one of the four Days, then Monday shall be allowed; so likewise where the Defendant pleads in Abatement, he may at any Time after waive the Special Matter and plead the General Issue, unless there is a Rule made for him to plead as he will stand by it.

Where there is a Plea in Abatement, or the General Issue is pleaded, if not entered, the Defendant may waive it.

Marckar *versus* Harris. Mich. 4 Will. III.

(12.) **I**n an Action of Debt for Rent; the Defendant pleaded, that the Plaintiff Nil habuit in tenementis; the Plaintiff replied, that he was possessed of the Tenements by Vertue of a Lease for forty Years, made to him by the Lord Wotton, who had Power to demise the same; and upon a Demurrer to this Replication it was adjudged good, without setting forth the Title, for Nil habuit in Tenementis is the Issue, and the Plaintiff may reply, quod satis habuit in Tenementis, (viz.) in Fee or Tail, &c. and at the Trial Evidence may be given of any other Estate, because the particular Estate alledged in the Pleading is only Form, where the Issue is Nil habuit in Tenementis.

Where Nil habuit in Tenementis is the Issue, the Title needs not be set forth.

J U D G M E N T.

Judgment
shall have
Relation to
the first Day
of the Term.

(1.) **A** Judgment shall have Relation to the first Day of the Term, as if it was given on that very Day, unless there is a Memorandum to the contrary, as where there is a Continuance of the Cause till another Day in the same Term, per Holt Ch. Just.

2 Lutw. 1352.

* The Names
of the Suitors
ought to be
set forth.

Judgment
pleaded in
an inferior
Court with-
out any
plead, le-
vied, ill.

(2.) In Trespas for Taking a Gelding, the Defendant pleaded, that in such a County Court, coram * spectatoribus ejusdem Curiae per considerationem Curiae debito modo recuperavit versus praed' the Plaintiff 4l. tam occasione cujusdam insultus & transg. eidem defenden' per praedict' the Plaintiff, and such a one his Wife illat', quam pro mis. & custagiis, &c. and upon a Demurrer to this Plea it was adjudged ill, because here was a Judgment in an inferior Court pleaded without any Plea ledied; and because the Names of the Suitors are not set forth, and the Judgment is pleaded as obtained against the Husband, when the Action was brought against Husband and Wife.

After a Rule
to sign Judg-
ment there
must be four
Days exclu-
sive.

(3.) After a Rule to sign Judgment, there ought to be four Days before the Judgment is sign'd, and those four Days are computed exclusive of that Day on which the Rule was made, and of that on which the Judgment was signed; and this is because the Party may have a reasonable Time to bring a Writ of Error, if he think fit so to do, but in the Common Pleas they stay till the quarto die post without any Rule, but that Day is inclusive in that Court.

Judgment
cannot be
affirmed for
Part and re-
versed for
Part.

* See 2 Cro.
349. Jacob v.
Mills. But
that Case is
since denied
to be Law.
Allen 75.

(4.) Assumpsit upon two several Promises, one was found for the Plaintiff and the other for the Defendant, and Judgment for the Plaintiff as to one, and Nil capiat, &c. as to the other; sed sit in misericordia, the Defendant brought a Writ of Error and assigned for Error the Omission of the Words eat inde sine die: Et per Curiam, * the Judgment shall be reversed for the Whole, because it being an entire Thing cannot be reversed for one Part and affirmed for the other Part.

Warrant of
Attorney not
to be signed
by a Person
in Custody,
unless an At-
torney is
present.
Postea 14.

(5.) Regula. Pasch. 15 Car. 2. B. R. It was ordered by the Court, that an Officer shall not take any Warrant to confess a Judgment of any Person in his Custody, unless an Attorney for the Defendant is present, and subscribes his Name to such Warrant.

Banbury's Case. Hill. 6 Will. III. B. R.

(6.) **P**ER Holt Ch. Just. Every Judgment must not only be compleat, but also formal, therefore if a Quo Warranto is brought against the Defendant for usurping Royal Franchises, and the Court should give Judgment that he has no Title, yet unless they go on and say, quod abinde excludatur, 'tis ill; so in Debt upon a Bond, if the Defendant plead autrefois acquit in an Action upon the same Bond, and the Judgment was, that he (the Defendant) should recover Damages, * & eat inde sine die, this is naught without saying further, quod querens nil capiat per Billam, because Dismission is no Judgment in a Court of Law: And per Holt Ch. Just. If Trespass is brought for a Trespass done in Lands belonging to such a House, tho' it appear at the Trial that the Plaintiff had no Title to the House, yet the Court cannot give Judgment to turn him out, because it was not judicially before them.

Every Judgment must be both compleat and formal.

* 1 Vent. 27, 39.
See Jacob v. Mills. 2 Cro. 349.

Morrice *versus* Green. Pasch. 11 Will. III. B. R.

(7.) **I**N this Case it was held, that a Judgment by Nihil dicit is where one is in Court, and required to make answer to what is objected against him, but he is silent and says nothing in his Defence.

What is a Judgment by Nihil dicit.

(8.) There is likewise a Judgment for departing in Despite of the Court, and that is where the Party appears, and being to attend that Day, goes out of the Court without Leave of the Court, as in Common Recoveries where the common Vouchee comes in and pleads nul Tort, nul Disseisin, and then the Demandant imparts generally, and not to a Day certain; and for that Reason the Vouchee is still obliged to attend the Court, but doth not; then the Entry is, Postea eodem die revenit the Demandant, and because the Vouchee is not there but is departed, therefore the Demandant hath Judgment.

Departure in Contempt of the Court.

(9.) And lastly, There is a Judgment by Default, and that is where the Party hath a Day certain, and is demandable, and being demanded doth not appear, whereupon Judgment is given against him by Default; and these are distinct Judgments, which cannot be used the one for the other. See Co. Entr. 269. a. Rast. Ent. 173. b.

What is a Judgment by Default.

Anonymus. Mich. 10 Will. III.

Where Execution shall be stayed on a Motion, where not.

(10.) **U**PON a Motion to stay Execution on a Judgment, upon Pretence of an Agreement since the Judgment entered: Per Holt Ch. Just. where the Judgment it self was confessed and entered upon Terms, the Court will lay their Hands on it and see it performed, because 'tis no more than a conditional Judgment at first; but where the Judgment is absolute at first, there the Party shall be put to his Action upon any subsequent Agreement concerning it, or may bring an Audica querela, for the Court will not stay Execution upon a Motion; and in this Case the Chief Justice said, that he did not pretend to dispence Equity at large, but only by the Consent of the Parties, upon a Rule of Court.

Kirle *versus* Clifton. Trin. 1 Will. III. B. R.

Upon a Writ of Error, &c. the Defendant pleaded a Release of Errors, the Judgment shall be Nil capiat per Breve.

(11.) **U**PON a Writ of Error in B. R. to reverse a Judgment in C. B. the Defendant in Error pleaded a Release of Errors, and upon a Demurrer to this Plea, it was doubted what Judgment should be given, for the first Judgment being erroneous, the Court could not affirm it: Sed per Curiam, A nil capiat per Breve shall be entered.

Western *versus* Creswick.

4 Mod. 161. Goods were levied by a Fi. fa. and sold, and afterwards the Judgment was reversed.

(12.) **J**udgment against the Defendant in an Action of Debt on a Bond, and upon a Fieri facias directed to the Sheriff he took some of the Defendant's Goods and sold them, afterwards this Judgment was reversed; and upon a Motion to bring the Money into Court for which they were sold, or to pay it to the Defendant himself, the Court would make no Rule, for the Goods might be sold for less than they were Worth, therefore the Defendant may bring an Action of Trespass, if the Plaintiff doth not agree with him.

Davenant *versus* Rafter.

No material Difference between Costs and Damages.

(13.) **J**udgment in C. B. by Nil dicit, and upon a Writ of Error in B. R. the Error assigned was for Want of an Original; the Defendant in the Writ of Error pleaded a Release of all Errors; the Plaintiff replied, that the Release set forth by the

the Defendant recited a Judgment obtained by him for 600 l. Debt and Damages, *ultra mis & custagia*, and that this Release was of Errors in that Judgment; but the Judgment on which the Writ of Error was now brought, was for 600 l. Debt and Damages only, and therefore this must be another Judgment; and if so, then the Errors in such Judgment are not released. Sed per Curiam in C. B. if the Judgment is by Confession, 'tis always there entered *pro debito & damnis*, without any farther Addition; but in B. R. 'tis entered *tam pro debito & damnis, quam pro mis & custagiis*; but between Damages and Costs there is no material Variance, for Damages include Costs.

Stanfast versus Chamberlaine.

(14.) **I**N Ejectment, the Plaintiff had a Verdict at the Assises; per Curiam, the Judgment ought not to be signed till four Days after the Return of the Postea, which happened to be on the 6th of May, and on that very Day the Judgment was signed, but the Plaintiff did not take out Execution till two Days after the Signing the Judgment, so that the Defendant had Time enough either to bring a Writ of Error, or to move in Arrest of Judgment; yet because it was signed on the fourth Day after the Return of the Postea, when that Day ought to be Exclusive; it was adjudged to be irregular, and therefore the Judgment was set aside, and the Party had Restitution.

5 Mod. 205.
Antea 5. S. P.
Judgment
signed four
Days after
the Return
of the *Postea*.

JURISDICTION.

(1.) **T**HE Jurisdiction of Ecclesiastical Courts arises either as Incident or Principal; and then 'tis either from the Nature of the Thing, as Causes Matrimonial and Testamentary, or from the Person, as Beating a Clerk, or from the Place, as Scolding in the Churchyard, Cutting Trees there, or contemptuous Words spoken in Court.

How the Jurisdiction of Ecclesiastical Courts arises.

(2.) In some Causes the Spiritual and Temporal Courts have a concurrent Jurisdiction; as where a Man is entitled to a Pension by Prescription, he may sue for it in either Court.

Where both Courts have a concurrent Jurisdiction.

(3.) Now

1 Saund. 14.
1 Sid. 330.
What shall
not be in-
tended to be
out of the
Jurisdiction.

(3.) Now as to Pleading a Jurisdiction, it hath been adjudged, that where an Indebitatus Assumpsit was brought in Durham pro mercimoniis venditis, without saying ibidem, this is good; for a Court of a County Palatine is an original Superior Court, and therefore it shall be intended, that the Contract was made within the Jurisdiction, tho' 'tis not set forth in the Declaration; for nothing shall be intended out of the Jurisdiction of a Superior Court, but what Specially appears to be so.

Sid. 342.
Where the
Cause of Ac-
tion is laid
infra juris-
isdiction.

(4.) So where Matter of Aggravation is not laid to be within the Jurisdiction of any Inferior Court; yet, if the Cause of Action be laid to be *infra jurisdictionem*, 'tis well enough.

Sid. 86, 95.
Where
Words must
be laid to be
spoken *infra*
jurisdictionem.

(5.) Case for Words per quod she lost her Marriage, if the Speaking be laid within the Jurisdiction, and not the Loss of Marriage likewise, 'tis ill, because that is the Cause of Action; otherwise, if the Words had been actionable in themselves.

Sid. 105
In all *Assump-*
sits it must
be *infra ju-*
isdictionem.
1 Vent. 100.
Where an
Assumpsit
will not lie
for carrying
Goods *extra*
jurisdiction.

(6.) In all Assumpsits the Consideration must be laid to be *infra jurisdictionem*.

(7.) An Agreement was made within the Jurisdiction of the Marshalsea to carry Goods to York, an Assumpsit will not lie in that Court, as upon an Agreement to carry Goods to York, because the Carrying is out of the Jurisdiction of that Court; but the Plaintiff may declare generally, that the Defendant being indebted to him for Carriage, he promised to pay, so nothing will appear to be out of the Jurisdiction.

1 Vent. 73.
Case for su-
ing in Infe-
rior Court.

(8.) Case lies against the Plaintiff for suing him in an Inferior Court, where the Cause of Action arises out of its Jurisdiction.

JUSTICES of PEACE.

The Queen versus Burnaby. Trin. 3 Annæ.

UPON a Certiorari a Conviction before two Justices for cutting down several Lime-Trees in the * Night-Time, being removed into B. R. the Defendant offered to plead, that he had * a Title to the Trees, but three of the Judges would not admit the Plea; for if the Justices had no Jurisdiction, as they had not, if Property had been the Question before them, then an Action lies against those Justices, and against him who executes their Order; but if they had Jurisdiction, then B. R. hath not Power to question their Judgment, therefore this would be altogether new, and without Precedent. But Holt Ch. Just. held, that St. John's Case was a Precedent; and tho' the Roll could not be found, yet it was and must have been done so in that Case, otherwise the Point could not have come in Question; that 'tis as reasonable to falsify the Proceedings of the Justices by this Plea, as 'tis by Action to be brought against them; that if B. R. confirms this Order, then no Action will lie against him who executes it, because he Acts by the Authority of this Court, and that there could be no Reason for him to give an Authority and aid a Fiat to a Thing which ought not to be done: But this Conviction was set aside for another Reason (viz.) because the Number and Nature of the Trees were not expressed: As to the Objection, that they were so small they could not be numbered; the Answer was, if they cannot be numbered, then it ought to set forth so many Bundles, Faggots or Loads, for the Number or Quantity ought to be certain in this Case, as well as in an Action of Trespass, because that is to be the Measure of the Damages; and if that had been done, then this Conviction would have been a good Plea in Bar to an Action of Trespass for the same Cutting.

¹ Salk. 181.

^{*} 27 Eliz. c.

7.

^{*} 3 Cro. 821.

⁵ Rep. St.

John's Case.

Where Pro-

perty is in

Question,

the Justices

have no Ju-

risdiction.

JUSTIFICATION.

Matter of Justification cannot be given in Evidence, but where it cannot be pleaded.

1 Saund. 27. Where a Man cannot justify a Trespass, unless he confesses it.

(1.) **M**atter of Justification can never be given in Evidence, but where it cannot be pleaded; therefore in Trespass upon Not guilty pleaded, for assault demesne cannot be given in Evidence; but 'tis otherwise in an Indictment for Murder, &c.

(2.) In Trespass for entering his Close, treading down his Grass, and feeding his Cattle there; the Defendant pleads, that W. R. had Common there, and appointed him (the Defendant) to look after his Cattle, and that he enter'd to see them, quæ est eadem transgressio, and upon Demurrer to this Plea, it was adjudged ill; for the Defendant justified his Entry only, and not the Feeding, and a Man cannot justify a Trespass unless he confesses it; but here the Defendant did not confess it, therefore the Plea being entire, the Justification is bad for the Whole.

1 Saund. 14. The Justification must go to the whole.

(3.) In Trespass for an Assault, Beating, and Wounding, and Evil Entreating; the Defendant as to the Wounding pleads Not guilty, and as to the Residue, that being Churchwardens, the Plaintiff sat in the Church with his Hat on his head, and they pulled it off, quæ est eadem insult, verberatio & maletractio; this was adjudged no Justification, because nothing was said as to the Beating, tamen quare, for Trespass to the Person imports a Beating, but it seems rather to be an Assault.

2 Lutw. 932. Where the Justification is repugnant.

(4.) Trespass quare vi & armis he assaulted and beat the Plaintiff, and took and imprisoned him; the Defendant as to the Force, Assaulting and Beating, pleads Not guilty, as to the Taking and Imprisoning him he justifies under a Process to arrest him: This was adjudged ill, because repugnant, for the Defendant having denied any Assault and Battery, afterwards confesses it, by justifying the Taking.

1 Roll Rep. 331. Justification to Part, good.

(5.) Trespass for Beating his Servant per quod servitium amisit; the Defendant justifies the Battery, but said nothing as to the Loss of the Service; and upon a Demurrer to the Plea it was insisted, that was the Principal Matter to which the Defendant had not given any Answer. Sed per Curiam, the Loss of the Service is the Consequence of the Battery, and that being justified, is a sufficient Answer to the Rest.

Swinned

Swinstead versus Smith. Mich. 8 Will. III. B. R.

(6) **T**HIS Case is reported in * 1 Salk. by the Name of Swinstead versus Lyddall. It was an Action of Trespass for an Assault, Battery, and false Imprisonment, and for keeping and detaining the Plaintiff, quousq; he paid the Defendant 11 s. The Defendant justified under an Order of the Court of Conscience, &c. by Vertue whereof he took and imprisoned the Plaintiff, and detained him until he paid 10 s. 4 d. &c. And upon a Demurrer to this Plea it was objected, that it did not answer the Declaration, for that was for detaining the Plaintiff, quousq; he paid 11 s. and the Plea is, that he detained him, quousq; he paid 10 s. 4 d. so where a Man declares in an Action of Trespass for taking eleven Sheep, 'tis no answer to justify the Taking ten of them; so likewise if the Plaintiff declare for falsely imprisoning him for three Days, 'tis no Answer to justify for two Days: But on the other Side it was argued, that the Gift of this Action was for the false Imprisonment, as in Trespass for Taking his Horse and immoderately Riding him; the Defendant justified the Taking by the Plaintiff's Leave, but said nothing to the Riding; and upon a Demurrer that was adjudged a good Plea, because the Gift of the Action was the Taking the Horse, and the immoderate Riding was only an Aggravation of the Trespass, and this was Bringlo and Morris's Case, Hill. 27 & 28 Car. 2. B. R. Et per Holt Ch. Just. in the principal Case; the quousq; is only an Aggravation, for the Action was not brought for Taking the 11 s. but for the false Imprisonment and detaining the Plaintiff quousq; &c. as in Trespass for Taking three Sheep, every Sheep is the Cause of the Action, (viz.) Part of the Cause, and so for imprisoning the Plaintiff for three Days, and therefore the Taking every Sheep and imprisoning for every Part of the Time must be answered; 'tis true, if the Plaintiff had been to pay 10 s. 4 d. only, and that after it was paid, the Defendant detained him till he had paid 8 d. more, that might have been material, but then the Plaintiff should have set forth this Matter in * a Replication; so this was adjudged a good Plea.

* 1 Salk. 408
Justification,
where 'tis
good for
Part.

* Moor 704.
2 Saund. 5.
Sid. 472.

Sheppard versus Tailour.

(7.) **I**N Replevin for Taking six Dishes, the Defendant justified under a Judgment in a Court-Baron, and a Levari facias awarded, by Vertue whereof he took the Dishes, and upon a Demurrer to this Plea it was adjudged to be ill, because the Execution upon a Judgment in a Court-Baron ought to be by Distrin-

Justification
under a
Judgment in
a Court-Baron, ill.

gas, and not by *Levari facias*, unless there is a special Custom to warrant it; besides, the Defendant should not have begun his Plea with the Judgment, but should have gone on gradually, (*viz.*) he should have shewn that there was a Pleint levied, &c. and taliter processum fuit superinde, that a Judgment was obtained, &c.

Freeman *versus* Blewitt. Hill. 12 Will. III.

1 Salk. 409.
Where any
Officer justifies
under a
returnable
Writ, he must
shew that the
Writ was re-
turned.

(8.) **R**uled per Holt Ch. Just. in this Case, to which the Court agreed, that in *Trespas*s, if the Sheriff or other principal Officer justifies by Vertue of a *Capias* or any returnable Writ, he must shew that the Writ was returned, but not if he justifies under a *Replevin* or an alias *Replevin*, for these are not returnable Writs, but a *Pluries Replevin* is returnable; for the Writ commands the Sheriff to replevy the Goods, *vel causam nobis significare*, therefore he must return the Writ, otherwise this Inconvenience might happen, (*viz.*) that if the Defendant should appear and be *Nonsuit* (for he is the first *Ador*) the Court would be at a Loss how to give Judgment, whether *pro retorn*' habend', or a *Capias* in *Withernam*, or a meer *Nonsuit*.

Searle *versus* Bunnion.

2 Mod. 70.
Where a
Man may justify
on his
Possession
without
shewing a
Title.

* Yel. 75.
Cro. Car. 138.
3 Mod. 132.
Lutw. 1492.

(9.) **I**n *Trespas*s, &c. The Defendant pleaded, that he was possessed of the *Locus in quo*, &c. and so justified the Taking the Cattle Damage-feasant; and upon a Demurrer to this Plea it was objected that it was ill, because 'tis not sufficient for him to say generally, that he was possessed, &c. for in pleading he ought to shew the Commencement of his Term: Sed per Curiam, where *Trespas*s is brought, and the Defendant will justify by Vertue of any * particular Estate, there he must shew the Commencement of such Estate or Title, but where the Matter of Justification is collateral to the Title to the Land, (*viz.*) where the Title can never come in Question; there such a Justification as in the principal Case, is good.

L A W S.

(1.) **T**HE Saxon Laws were all unwritten till Ethelred the first Christian King published them in Writing. Rel. Spelm. 8.

(2.) And those Laws had a Mixture of the British Customs, and the Danish Laws had a Mixture of both; but William, called the Conqueror, made a new Model of them, for some he approved, and some he rejected, and added more, of which there was a Copy in Rowland Abby, under this Title, *ce's sont leges & les Customes que le Roy William Grantoist a tout le peuple de Angleterre apres le Conquest de la terre icy, &c.* Seld. on For-
tescuc, Cap.
17. Par. 7.

(3.) Mr. Selden tells us, that the Roman Laws were in Use in Britain, for they had several Colonies here, and each of these Colonies was governed according to the Roman Laws, but compares them to a Ship, which by long and frequent mending hath nothing left of the first Materials of which it was made.

(4.) And as to that Question, when and how began our Common Law, he tells us 'tis a trivial Question, and that it began as the Laws of all other States, (viz.) when there first began to be a State in the Land.

(5.) Laws are divided into Arbitrary or natural Laws, the last of which are essentially just and good, and bind every where and in all Places where they are observed.

(6.) Arbitrary Laws are either concerning such Matter as is in its self morally indifferent, in which Case both the Law and the Matter and subject of it is likewise indifferent, or concerning the natural Law it self, and the regulating thereof.

(7.) Now all arbitrary Laws are founded in Convenience, and depend upon the Authority of the legislative Power which appoints them, and both are for maintaining publick Order.

(8.) Those which are natural Laws are from God, but those which are arbitrary are properly humane and positive Institutions.

(9.) Upon the Whole, we may consider the World as one universal Society, and then that Law by which Nations are governed,

ed, is called Jus gentium, if we consider the World as made up of particular Nations; then the Law which regulates the publick Order and Right of Men is called Jus publicum; and that Law which regulates the private Right of Men is called Jus civile.

LEASE at WILL.

Layton *versus* Feild. Hill. 13 Will. III. B. R.

Lessee at Will cannot determine his Will after a Quarter of a Year commenced, without paying that Quarter's Rent.

(1.) **P**ER Holt Ch. Just. Where a Lease is made at Will, the Lessee, after a Quarter of a Year is commenced, may determine his Will, but then he must pay that Quarter's Rent; and if the Lessor determine his Will after the Commencement of a Quarter, he shall lose his Rent for that Quarter: But if a Lease be made from Year to Year, quamdiu ambabus partibus placuerit, in such Case after a Year is commenced, neither the Lessor or the Lessee can determine their Wills for that Year, because they have willed the Estate certain for so long Time.

Germaine *versus* Orchard. Trin. 6 Will. III.

1 Salk. 346. Lessee for Years grants the Lands to W. R. habend. to him and his Executors after the Death of K. K. the Lessor and his Wife, his whole Interest passed.

(2.) **T**HE Case was, Lessee for Years of Lands granted the said Lands to W. R. his Executors, Administrators and Assigns, Habendum to him and to his Executors, &c. after the Death of the Grantor and his Wife; adjudged, that by the Grant of the Lands generally, the Grantee is Tenant only at Will to the Grantor, that being Estate enough to satisfy the Grant; for it doth not appear that by a Grant of the Lands the Grantor intended to pass his whole Interest and Term; but this Judgment was reversed in the Exchequer Chamber, and there it was held, that if A. is possessed of Black-acre for a Term of Years, and grants it to W. R. (not saying, and to his Executors, nor for what Term and Interest) in such Case W. R. is only Tenant at Will to the Grantor; but if he devise Black-acre

to

to W. R. the whole Estate passeth; for if it should be an Estate at Will, it would either never begin, or determine as soon as it begins.

Anonymus. Pasch. 4 Annæ. B. R.

(3.) **P**ER Curiam obiter, it was held, that a Grant or Authority to come upon my Lands, and to hunt there, is but a License and no more, but if 'tis to take the Profits, 'tis a Lease at Will; so if 'tis to take the Profits for a Year, 'tis a Lease for a Year, for this passes an Interest, the other is only an Authority to do particular Acts.

Difference where there is an Authority, and where an Interest.

L E G A C Y.

(1.) **T**HE Cognisance of a Legacy properly belongs to the Spiritual Courts, for such Bequests were not good at Common Law, the Rule being post mortem tunc tua non sunt.

Legacy is sueable in Spiritual Court.

(2.) But this must be understood where a Legacy is devised generally; but if 'tis payable out of the Land, or out of the Profits of the Land, an Action of the Case lies at Common Law, but the usual Remedy is in Chancery.

Sid. 44. Where 'tis payable out of Lands, the Remedy is in Chancery.

(3.) The Testator being possessed of several Leases, devised them to his Wife for Life, Remainder to his Son for Life, and he owing several Debts, the Wife paid as far as the Goods and personal Chattels went, and assented to the Legacy and died, there being several Debts still unpaid; then her Executor articles with those Creditors to convey a Lease to them, and they exhibit a Bill in Equity against the Executor and the Son, to have a Conveyance, and the Lord Keeper Finch decreed a Conveyance; for first, an Executor is not bound to pay a Legacy unless he hath Security given to refund, if there are Debts; and the Reason is, because a Legacy is not due till the Debts are paid, for a Man must be Just before he is Charitable; and therefore, if a Legacy is paid, it remains still in the Hands of the Legatee as a Legacy; but if the Legatee alien bona fide, the Creditor is defeated, for he had a Title, and the Purchaser

Where an Executor is not bound to pay a Legacy.

1 Ch. Rep. 257.

chaser shall not be prejudiced by this Trust for Creditors : Now in the Principal Case, an Assent to a Legacy will not do any more than an actual Payment would have done.

1 Ch. Rep.
198.

(4.) A Sum of Money devised to W. R. to be disposed as the Testator should appoint by a Private Note ; now if there was no such Note or Appointment, then 'tis a Legacy to W. R. himself.

Moor 713.

(5.) Legatee of a Term must not plead, that it was devised to him, and that he entered, but that he entered by Assent of the Executor, or Virtute Legationis.

L I B E L.

The King versus Alme & Nott. Trin. 11 Will. III.
B. R.

What shall
make a Li-
bel, what not.

(1.) **I**nformant for a Libel against several Subjects, &c. to the Jury, unknown. Et per Curiam, where a Writing which inveighs against Mankind in General, or against a particular Order of Men ; as for Instance, Men of the Gown, this is no Libel, but it must descend to Particulars and Individuals to make it a Libel.

The Queen versus Drake. Mich. 5 Annæ B. R.

2 Salk. 660.
Information
for a Libel
differing in
one Word
from the Li-
bel itself, not
good.

(2.) **I**nformation against the Defendant, setting forth, that he being civilly disposed, &c. did make a Libel intituled Mercurius, containing divers scandalous Matters secundum tenorem sequen', and so set forth some Paragraphs, and in one of them there was the Word Nec instead of Non, so that it was not literally the same as in the Libel ; however it did not alter the Sense ; but upon Not guilty pleaded, this Variance being per-
ceived

ceived at the Trial, the Counsel for the Defendant insisted, that it might be found Specially, which was done; and afterwards, upon arguing this Special Verdict, Judgment was given for the Defendant: It was objected against him, that this Variance was immaterial, and that in every Action for Words the Plaintiff usually declares, for Speaking hæc Anglicana verba sequentia; but 'tis not necessary to prove every Word; therefore to make every literal Omission or Variation fatal, would be to make this Action impracticable. But per Curiam, the * Tenor is the Transcript Copy of some Original, to which it may be compared, and therefore there can be no Tenor of Words spoken, because there is no Written Original; but there may be a Tenor of a Writing, which Word always imports a true Copy of the Thing written, and consists in Identity. Et per Holt Ch. Just. A Libel may be described either by the Sense, or by the Words; and therefore an Information charging, that the Defendant made a Writing, containing such Words, is good, and in such Case a nice Exactness is not required, because 'tis only a Description of the Sense and Substance of the Libel. But an Information, charging the Defendant with making a Writing secundum tenorem sequentem, there the Written Libel, and that set forth in the Information, must exactly agree, because every Word in the Information is a Mark of Description of the very Libel it self; so in Trespass, Quare clausum fregit, &c. if the Plaintiff sets forth the Buttalls and Boundaries of his Close, and fails in the Proof thereof, he cannot recover; because he is obliged to prove his Description; and there is no Difference between Wrongs done by Words and by Things.

(3.) Words are transient, and vanish in the Air as soon as spoken, and there can be no Tenor of them, as hath been already observed, and therefore an Identity is not required, and tho' the Jury find some Omissions, it will be sufficient, if some be proved, and in such Case the Plaintiff shall recover; but when a Thing is Written, tho' every Omission of a Letter may not make a Variance, yet if such Omission makes a Word of another Signification, 'tis fatal.

Dyer 203.
3 Cro. 503.
2 Cro. 407.
Hob. 129.
Yelv. 46, 152.
5 Rep. 53.
Cro. Car. 328.
2 Saund. 121.
Co. Ent. 508.

Cropp *versus* Tilney. Mich. 5 Will. III. B. R.

(4.) **U**PON a Writ of Error on a Judgment in an Action on the Case, wherein the Plaintiff declared, that he stood to be elected for a Member of Parliament, and that the Defendant caused a Libel to be printed of him with these Words, as spoken by the Plaintiff (viz.) There is a War with France, of

Innuendo,
where good.

G g

which

* 3 Cro. 428.
2 Rep. 10.
Roll. 82.
Yelv. 21.
Hob. 6.
1 Roll. Rep.
24.

which I can see no End, unless the Young Gentleman on the other Side of the Water, (innuendo the Prince of Wales) be restored, per quod, he lost his Election, ad damnum, &c. there was a Verdict for the Plaintiff, and Judgment in C. B. and now, upon a Writ of Error in B. R. it was insisted, that an * Innuendo cannot beget an Action, nor make that certain which was uncertain before, and that here was no Scandal; and if so, this was not a Libel. Sed per Holt Ch. Just. scandalous Matter is not necessary to make a Libel, 'tis enough, if the Defendant induces an ill Opinion to be had of the Plaintiff, or to make him contemptible and ridiculous; as for Instance, an Action was brought by the Husband for Riding Skimmington, and adjudged that it lay, because it made him ridiculous, and exposed him. Every Man understands who is meant by the Young Gentleman on the other Side the Water; if Words are false, the Defendant may justify in an Action, but not in an Indictment.

The King versus Bear. Hill. 10 Will. III.

2 Salk. 417.

* *Antea* 2.
S. P.

(5.) **I**ndictment for Making, Writing, Composing and Collecting several Libels, in uno quorum continetur inter alia juxta tenorem & ad effectum sequen', &c. after a Verdict this was held good, for juxta tenorem imports the same Words; for * Tenor is a Transcript, which it cannot be if it differs from the Libel; if it had been ad effectum sequen', it would not do, for that might import an Identity in Sense, but not in Words.

Limitation of Action. *See Evidence 5.*

Collins versus Denning. Hill. 12 Will. B. R.

- (1.) **A**ssumpsit, in which the Plaintiff declared, that the Defendant being indebted to him (the Plaintiff) in 20 l. promised to pay it upon Demand, and that he (the Plaintiff) had on such a Day and Place demanded it, but the Defendant refused to pay it; the Defendant pleaded Non Assumpsit infra sex Annos, &c. and upon a Demurrer to this Plea it was insisted, that it was ill, for it should not be Non Assumpsit, but Actio non accrevit infra sex Annos, &c. because the Duty arises from the Demand and not from the Promise: But this Objection was not allowed, for Payment upon Demand is no more than what is implied by Law.

Where *Non Assumpsit infra sex Annos* is a good Plea.

Ewers versus Jones. Mich. 2 Annæ.

- (2.) **L**ibel in the Admiralty by the Seamen against the Owners for Wages, the Defendants pleaded the Statute of Limitations, (viz.) That it appeared by the Libel, that no Suit was prosecuted for this Matter within six Years, whereas they should have pleaded directly, that no Suit had been brought within six Years after the Cause of Action accrued; and if the Statute had been rightly pleaded, it would have been a good Bar; for per Holt Ch. Just. tho' the Statute doth not extend to Causes maritime, spiritual, or equitable, but only to Duties at Common Law, yet Mariners Wages are a Duty at Common Law, and if sued for at Common Law, the Statute would have been a good Bar.

Mod. Cases 26.
Statute not well pleaded.

Hide versus Partridge. Pasch. 1 Annæ.

- (3.) **U**PON a Motion for a Prohibition to the Admiralty, suggesting a Contract at Land, and a Suit for Wages thereon by the Mariners against the Owners, upon an out-

2 Salk. 424.
Whether the Statute extends to Mariners Wages.

ward-bound Voyage, and that he had pleaded the Statute of Limitations in that Court, which Plea was rejected, for that the Statute did not extend to Causes maritime, &c. and that it was no Plea in Bar to a Trust or to a Legacy; and now it was insisted for the Prohibition, that the Common Law had a proper Jurisdiction for Mariners Wages, and that the Suit might be as well brought for such Wages in the Courts of Common Law as in the Admiralty, so that the Admiralty had at most but a concurrent Jurisdiction in this Case with the Courts of Common Law, and that only by Indulgence of Law, which ought not to be extended so far as to suffer them to proceed in the Admiralty, otherwise than they might at Common Law: Et per Holt Ch. Just. It is a Question among Merchants, whether Mariners Wages were due for outward-bound Ships: But per Powell Just. whether they are due or not, is a Question properly determinable in the Admiralty; and he questioned, whether the Statute could be pleaded to a Suit in the Spiritual Court for laying violent Hands on a Clerk; and per Holt Ch. Just. clearly it would be no Plea in that Case, no more than it would be to an Indictment at Common Law, for that is a Prosecution of a publick Nature, pro reformatione morum, and not a private Action of the Party to have Recompence in Damages, the Rule was for the Plaintiff to take a Prohibition, and to declare upon it:

Morse versus Braxton. Pasch. 12 Will. III. B. R.

An original in one County cannot maintain an Action in another County.

(4.) CASE, &c. in which the Plaintiff laid his Action in Norfolk; the Defendant pleaded the Statute of Limitations; the Plaintiff replied an Original taken out in Suffolk, upon which they were at Issue, and the Plaintiff had Judgment in C. B. but upon a Writ of Error in B. R. that Judgment was reversed, because an Original in one County cannot maintain an Action in another County.

Words which are actionable are not within the Statute.

(5.) Scandalum Magnatum is not within the Statute 21 Jac. cap. 16. nor slanderous Words, which are actionable only by Reason of any subsequent Loss or Damage, nor slandering a Title, but slanderous Words, which are personal and actionable in themselves, are within the Statute.

Where the Plaintiff is beyond Sea his Case is not within the Statute.

(6.) Where the Plaintiff is beyond Sea, his Case is not within the Statute; but if the Defendant is beyond Sea, 'tis otherwise.

Where a new Promise will revive the Action:

(7.) Where an Action is barrable by this Statute, a new Promise will revive it; so 'tis of an Acknowledgment, because that is Evidence of a Promise:

(8.)

(8.) A Latitat taken out and continued is a good Avoidance of the Statute, for 'tis a Demand.

M A N D A M U S.

Wilkins *versus* Mitchell.

(1.) **I**N an Action of Debt for Rent brought in an inferior Court, the Plaintiff was Nonsuit, whereupon the Defendant had Judgment, but they refusing to execute it, B. R. was moved for a Mandamus, but it was denied, because the Defendant had a legal Remedy, (viz.) By the Writ de executione judicii out of the Chancery.

Mandamus denied where the Party hath another, and proper Remedy.

The King versus Mayor of Dartmouth. Trin.
12 Will. III.

(2.) **A** Mandamus to restore W. N. to the Place *Servientis ad clavem*, meaning the Serjeant of the Mace, &c. The Return was, that there was no such Office in that Corporation, but that there was an Office *Servientis ad clavam*, to which they prescribe to put in and out an Officer at Pleasure, &c.

Mandamus to restore a Serjeant *ad Clavem*, instead of *Clavam*.

The King versus Mayor of Andover. Trin.
12 Will. III.

(3.) **M**andamus to restore him to the Place of an Alderman in Andover; the Return was, that he was so poor that he could not pay the Taxes: Et per Holt Ch. Just. Where a Man thro' Poverty cannot pay his Scot and Lot, 'tis fit to deprive him of Magistracy, but not of Liberty; so a Mandamus was denied.

2 Salk. 433. It will not lie to restore a poor Alderman.

Lee versus Oxenden. Trin. 3 Will. III. B. R.

3 Mod. 332.
Not granted
to restore a
Proctor in
Drs. Commons.

(4.) **L**EE suggesting that he was debite juratus & admissus in loco & officio of a Proctor, &c. and also that he was displaced and amoved from his said Office, prayed a Mandamus to be restored, and insisted, that he had a Freehold in his Office, and that it concerned the Administration of Justice, but the Mandamus was denied, because this Matter was merely spiritual, and B. R. cannot take Notice of it, nor correct Errors in their Proceedings, in Cases where they have a proper Jurisdiction and Cognisance; so that this being of an Ecclesiastical Nature, and the Deprivation being a judicial Act, it cannot be avoided but by Appeal.

The King versus Mayor of Chester.

5 Mod.
Mandamus to
restore nine
Persons
jointly,
quashed for
that Reason.

(5.) **A** Mandamus was granted to restore Brett and eight other Persons to the Place of Common Council-men of Chester; the Mayor made a bad Return, however, the Court quashed the Mandamus, being joint for nine Persons, when they had several Offices and Interests, and ought to have several Writs of Mandamus.

The Queen versus Cory. Mich. 8 Will. III.

Where not
granted
without an
Affidavit of
the Fact.

(6.) **T**HE Court was moved for a Mandamus to the Justices of Peace, for that they proceeded to remove W. R. from his Place of Abode, after he had offered to give Security to indemnify the Parish: Et per Holt Ch. Just. In a Matter of Right, as for Instance, where a Mandamus is prayed to restore a Man, &c. we never require an Affidavit of the Fact, but this is required upon a supposed Failure of Duty in the Justices, and therefore denied to grant a Mandamus till Affidavit made, &c.

King and Queen versus Dr. Gower. Trin. 1694. B. R.

Mandamus
will not lie
to turn out a
Fellow of a
College.

(7.) **A** Special Mandamus was directed to Dr. Gower, &c. reciting, that such particular Fellows of his College had not taken the Oaths, so that their Fellowships were void by the Statute 1 Will. 3. and requiring him to turn them out, and to place new Fellows in their Room; the Return was of several Statutes, one of which was, that no one shall lose his Freehold

with-

without being heard and admitted to answer the Charge, and that the Persons named in this Mandamus were duly elected, &c. and that non constat, &c. but they had taken the Oaths: Et per Curiam, as to this last Part of the Return, 'tis ill, because the Oaths are to be taken before the Master and Fellows; but the chief Question was, whether a Mandamus would lie in this Case, and in this Manner, and the Court inclined, that it would not, because the Fellows who are to be turned out, are no Parties to this Writ, so that they would be displaced without being heard, and without Answer; and this differs from the Common Cases of Mandamus, which are usually to restore Men to their Rights, and are directed to them by whom the Injury is done; and tho' it may happen, that even in such Case a Man may be turned out of his Place, yet that is collateral, and not by Command of the Writ.

The King versus Taylor.

(2.) **M**andamus to restore him to his Place of Alderman of the City of Gloucester; the Return was made by the Mayor and Bailiffs, (viz.) they returned their Power, &c. and that Taylor was removed by thirty of the Common Council-men in the Council-Chamber assembled, for that he was a Common Drunkard. Et per Curiam, this Return was adjudged ill, because it did not appear, that the thirty Common Council-Men were then and there assembled as a Common Council, for they might be there to feast, or to other Purposes.

Mandamus, to whom to be directed, and where the Return was ill, and where the Cause of Removal was ill.

But that the Cause returned was sufficient to remove him. 'tis true, if a Man is Drunk by Accident, that would not be Cause to remove him; but habitual Drunkenness makes a Man unworthy to be a Magistrate, and disables him in Point of Government.

Tho' the Removal was by the Mayor and thirty of the Common Council-men, yet the Writ ought not to be directed to them, but to the Corporation by its proper Name, as it was in this Case to the Mayor and Bailiffs.

But the Return being ill for the Reason before mentioned, a Writ of Restitution was granted; and afterwards the Question was, whether the Corporation might proceed against him de novo for his Drunkenness? and the Court held they might.

¹ Roll. Rep. 409.
² Bull. 189.

The King versus White. Trin. 2 Annæ.

Denied to re-
store a Clerk
of a Com-
pany in Lon-
don.

(9.) **M** Andamus to restore him to his Place of Clerk to the Butchers Company in London, it being a Charter-Office; but per Curiam, it was denied, for if 'tis an Office of Freehold, he may have an Assise, if 'tis not an Office of Freehold, then 'tis only a Private Service, which doth not concern the Publick.

The Queen versus Inhabitants of Littleport. Hill. 2 Annæ.

2 Salk. 531.
Mod. Cases
97.
Mandamus
to the pre-
sent Over-
seers to make
a Rate to re-
imburse the
old ones.

(10.) **T** HIS Case is reported in 2 Salk. by the Name of Tawny's Case, it was thus. A Mandamus to the Churchwardens and Overseers of the Poor of the Parish of Littleport, to make a Rate to reimburse the old Overseer of the Poor what Money he had laid out of his own for Relief of the Poor: The Return was, that the major Part of the Parishioners did not agree to his Account; and the Question was, whether the Plaintiff Tawney, being a former Overseer, but now out of his Office, should have a Mandamus to the present Overseers to make a Rate to reimburse the Money he laid out of his own to relieve the Poor? It was insisted in his Behalf, that he should have a Mandamus, because he was indictable for not relieving the Poor, tho' he had none of the Parish Money in his Hands, and he might die in his Office, therefore it seems reasonable, that the Law should give him some Remedy since it subjects him to this Charge. But per Curiam, The Law doth not oblige him to lay out his own Money to relieve the Poor; but he is to make a Rate, and this is to be allowed by the Justices, and the Poor are to be relieved out of this Money when raised; otherwise the Consequence would be, that Overseers of the Poor would lay out what Money they pleased, and Charge the Parish with it; so that what he did in this Case was voluntary, being in no wise compellable to do it, and therefore it would be unreasonable in this Court, to compel the succeeding Overseers to reimburse him; he should either have kept his own Money, or taken Care to have a Rate made, and that would have been his proper Method; and this Court never allows a Mandamus where the Law hath provided another Remedy, and a Rate cannot be made as for him, but to relieve the Poor.

The Queen versus Sir Richard Raines. Mich. 6 Anna.

(11.) **T**here is a Case reported by this Name in 1 Salk. but 'tis not the same Case, nor in the same Term, but four Years after. H. Mandamus to admit her to the Probate of a Will by which she was Executrix; the Return was that she was made Executrix durante minore ætate of W. R. and that the said W. R. was now of full Age, so that the Testator remained Intestate. Et per Holt Ch. Just. He should have returned generally, that she was not Executrix, or if he would return the Special Matter, as he hath done, he should have averred, that she was not Executrix aliter vel alio modo; but that the Return now made was not a direct Answer to the Writ, but only Argumentative, to shew that she was not Executrix. But the Court would not grant a peremptory Mandamus; they quashed this for the Insufficiency of the Return, and amerced the Defendant, and ordered an alias Mandamus, that the Suggestion of the Writ might be fully and plainly answered.

1 Salk. 299.
Mich. 10 W.
Mandamus
to admit one
to the Pro-
bate of a
Will.

(12.) Tho' the Return is insufficient, yet if it appear thereby that the Party ought not to be restored, he shall not be restored.

Sid. 14.

(13.) Where the Place is of meer Service, no Mandamus will lie; as for an Usher of a School; but where 'tis an Office, as Churchwarden, Sexton, Steward of a Court, &c. a Mandamus will lie; and so it will to restore an Attorney to his Place of Attorney in an Inferior Court, and to restore the Treasurer of the New-River-Water; but it will not lie to restore a Proctor of the Spiritual Court.

Sid. 457.

Sid. 69, 152.

Sid. 169.

3 Mod. 332.

(14.) A Fellow of New College was expelled by the Warden, &c. whose Sentence was confirmed by the Visitor; and this being returned on a Mandamus, it was objected, that the Cause of his Expulsion did not appear. Sed per Curiam, this being a private Eleemosinary Society, and a Visitor appointed by the Founder, no Mandamus lies; and therefore 'tis to no Purpose to object against the Return. Bagg's Case was the first Mandamus of this Sort; as for those mentioned in Ryley they are no more than Letters Recommendatory.

2 Lev. 14.

(15.) Mandamus lies to restore a Sexton upon a Certificate, that he is an Officer for Life, and had so much of every House in the Parish for Wages.

2 Lev. 12.

- 1 Vent. 302. (16.) Mandamus to restore a Common Council-man; the Return was, that he said Alderman W. R. was a Knave; disallowed, for the Words have no Reference to the Corporation; It was held by my Lord Hale, that Returns of this Nature ought to be sworn, and that it was so done in Meddlicott's Case; but of late it was disused.

Master and Servant.

Sir Robert Wayland's Case.

Where the Master is liable for the Cheat of his Servant.

- (1.) **H**E used to give his Servant Money every Saturday to defray the Charges of the foregoing Week, the Servant kept the Money, yet per Holt Ch. Just. the Master is chargeable, for the Master at his Peril ought to take Care what Servant he employs; and 'tis more reasonable, that he should suffer for the Cheats of his Servant than Strangers and Tradesmen; so if a Smith's Man picks my Horse, the Master is liable.

1 Roll. 94, 95.

Boulton versus Arliden. Pasch. 9 Will. III. B. R.
at the *Sittings* at Guildhall, coram Holt Ch. Justice.

Where the Master is not liable for his Servant.

- (2.) **I**n this Case it was held, that where a Servant usually buys for his Master upon Tick, and takes up Things in his Master's Name, but for his own Use, that the Master is liable, but 'tis not so where the Master usually gave him Ready Money. That where the Master gives the Servant Money to buy Goods for him, and he converts the Money to his own Use, and buys the Goods upon Tick, yet the Master is liable, so as the Goods come to his Use, otherwise not.

That a Note under the Hand of an Apprentice shall bind his Master, where he is allowed to deliver out Notes, tho' the Money is never applied to the Master's Use.

But where he is not allowed or accustomed to deliver out Notes, there his Note shall not bind the Master, unless the Money is applied to the Master's Use.

(3.) A Factor of the East-India Company carried over 1200 l. in Gold to India, where a Custom was due for it, but saved by the Factor and never paid: Et per Curiam, the Factor shall have the Benefit of it, and not the East-India Company, for it was due from them and ought to have been paid; therefore they cannot make a Title to it against one who hath the Possession, for that is sufficient against all Persons but against him who hath the very Right, and the Non-payment in this Case was at the Peril of the Factor.

Ch. Rep. 25.
Where a Factor of the East-India Company shall have the Benefit of what he saved, and which the Company ought to have paid.

MISCASTING. *See* Money.

M I S N O S M E R.

Lepara *versus* Sir John Jermaine. Pasch. 1 Annæ.

(1.) **T**HE Defendant was sued by the Name of John Jermaine, Knight; he pleaded in Abatement, that he was a Knight and Baronet; the Plaintiff replied, that he (the Defendant) was a Knight only; but the Plaintiff perceiving his Mistake, and the Proceedings being all in Paper, he prayed

1 Salk. 50.
Baronet is a Dignity and Part of his Name.

H h 2

Leave

Leave to amend, but it was denied, because there was nothing to amend by, for the Bill and Process was by the Name of Knight; then the Question was, whether Baronet was such a necessary Part of his Name, as the Action must abate for Want of it: Et per Holt Ch. Just. Baronet is as an essential Part of his Name as Knight, because 'tis a Dignity, and whether 'tis created by Act of Parliament or by Letters Patents, 'tis Part of his Name, as Duke, Viscount, Marquiss, Baron, tho' as to this last Name of Dignity, there is a Difference between a Baron by Tenure and a Baron by Patent, for in the first Case, Baron is not a Name of Dignity; and if 'tis omitted it shall not abate the Action, but a Baron by Letters Patents is a Dignity, and Part of his Name.

The King versus Bishop of Chester.

Where the Declaration is aided by the Verdict.

(2.) **I**N a Quare Impedit, the Plaintiff claimed under a Grant to Sir William Sands, who granted to the Lord Derby; the Defendant pleaded, that Sir William Sands, non concessit to the Lord Derby, upon which they were at Issue, and the Jury found, that it was granted to the said William Sands in the Declaration, by the Name of William Sands Esq; being then an Esquire, and afterwards made a Knight: Et per Curiam, this Declaration is aided by the Verdict, by which the Grant and the Identity of the Person were found; and this Explanation is no more than what is often done by the Plaintiff himself in late Cases, as for Instance, where W. R. is bound in a Bond by the Name of W. R. Esq; and is afterwards Knighted, the Plaintiff must bring his Writ against him by the Name of W. R. Knight, but in his Declaration he must shew the Special Matter, (viz.) that the Defendant bound himself by the Name of W. R. Esq; and was afterwards Knighted; but 'tis otherwise if the Defendant had craved Oyer of the Bond and demurred.

The King versus Bishop of Chester and Peirce.

2 Salk. 360. Knight is a Dignity and Part of his Name.

(3.) **I**N a Quare Impedit, the Defendant, as Patron, pleaded a Grant made by King Charles I. to William Thackston Armigero, postea militi, who granted it to the Defendant; the Plaintiff craved Oyer of the Letters Patents, &c. and it appeared to be a Grant to Sir William Thackston Knight, and upon a Demurrer to the Plea, Rookby Just. was of Opinion, that this might be the same Person, for he might have such a Name by Reputation: But per Holt Ch. Just. a Grant to William Thackston Esq; by the Name of William Thackston Knight, cannot be good, because Knight is a Name of Dignity, and Part of his

his Name, and as much his Name as the Name of Baptism; and if he might have such a reputative Name, he ought to have pleaded it so, (viz.) per nomen, or cognitus & reputatus per nomen, &c. as in the Case of a Bastard; but Knight cannot be a Name in Reputation, there is no Foundation for it, as in the Case of a Bastard, or the eldest Son of a Duke, who by the Laws of Heraldry takes Place as a Marquis, but the Title of Knight can be only conferred by the King; and in antient Conveyances the eldest Sons of Dukes and Earls had only the Addition of Esq; commonly called Marquess, &c. and now the Course is to make the Addition of eldest Son to such Title.

College of Physicians versus Dr. Salmon.

(4.) **D**E B C against the Defendant, for practising Physick without Licence, in which the Plaintiffs declare by the Name of the President of the College, seu Communitas of the Faculty of Physick in London, &c. The Defendant craved Oyer of the Letters Patents, whereby it appeared they were incorporated by the Name of the President, College, five Communitas of the Faculty of Physick in London, and were empowered to sue and be sued by the Name of Presidens Collegii, five Communitatis facultatis medicinae in London, and then pleaded Misnomer in Abatement: Et per Curiam, the Plea was adjudged good, for they may sue by their Name of Incorporation, which is President, Collegium, five Communitas of the Faculty of Physick, &c. or by the Name given to them for that Purpose, which is Presidens Collegii, five Communitatis, &c. but here they sue by neither of those Names, but by the Name of President of the College, seu communitas, &c. so Judgment was given quod Billam cassetur.

5 Mod. 327.
2 Salk. 451.
Misnomer
in the Name
of the Cor-
poration.

Afterwards, Trin. 13 Will. 3. B. R. another Action was brought by the same Plaintiff against the same Defendant, and for the same Cause; and this was brought in the Name of President, College, or Commonalty, which was the true Name of Incorporation; and upon Demurrer it was objected, that it ought to be brought in the Name of President of the College, for by that Name they have Power to sue: Sed per Curiam, they may sue by the Name of Incorporation, or by the Name of President only; but tho' by their Charter they have Power to sue by that Name; yet per Holt Ch. Just. 'tis better (as in this Case) by the Name of their Incorporation.

Anonymus. Hill. 2 Annæ.

Traverse of
his Name,
where 'tis
repugnant.

(5.) **T**HE Plaintiff declared against the Defendant by the Name of John, the Defendant pleads he was baptised by the Name of Benjamin, and traversed, that ipse idem Johannes was ever known by the Name of John; and upon a general Demurrer to this Plea, per Holt Ch. Just. this Traverse is repugnant in it self, and stands but as Matter of Form, yet Pleas in Abatement are not within the Statute of Eliz. but only Pleas to the Right and to the Merits of the Cause; but tho' the Traverse was repugnant, 'tis not immaterial, because it waived the precedent Matter, which was pleaded before of Baptism, and was become the Substance of the Plea it self, so that now the Issue must be by what Name the Defendant was called and known, and not by what Name he was baptised; but he might have relied upon his Name of Baptism, and concluded with it, for a Man can have but one Name of Baptism, therefore it implies a Negative of it self, without saying, that he was called or known by no other Name.

Anonymus. Mich. 10 Will. III.

Where an
Alias dictus is
proper.

(6.) **T**HE Obligor was bound by the Name of W. R. he may be sued by the Name of W. R. alias dictus W. C. if his Name is so; but if his Name is R. W. the Obligee cannot sue him by the Name of S. W. alias dictus R. W. for he cannot have two Names of Baptism, neither is there any Remedy, unless he hath stopped himself by Appearance.

Knight's Case. Trin. 2 Annæ.

1 Salk. 129.
Where *John*
was sued, and
he pleaded
in Abate-
ment, that
his Name
was *Thomas*.

(7.) **A**CTION against John Knight, the Defendant pleaded in Abatement, that his Name is Thomas, and thereupon the Plaintiff commenced a new Action against him by his right Name Thomas; the Defendant pleaded in Abatement a former Action depending; and upon a Demurrer to this Plea it was insisted, that the Abatement was against the Record, for that John and Thomas could not be the same Person; Sed non allocatur, for in fact it may be so, the Plaintiff should have confessed the Misnomer, and prayed an Abatement of his Writ before he had proceeded to a new one.

Allen *versus* Symonds.

(8.) **C**ASE, &c. in which the Plaintiff declared against the Defendant by the Name of Symonds; the Defendant pleaded in Abatement, that he was known by the Name of Symms, absque hoc, that he was known by the Name of Symonds; the Plaintiff replied, that he (the Defendant) was known as well by the one Name as by the other; and upon a Demurrer to this Replication, per Holt Ch. Just. the * Precedents are both Ways; thereupon the Defendant accepted a new Declaration, but without Payment of Costs.

4 Mod. 347.

* Rast. Ent.

716.

Old. Ent. 27.

M O N E Y.

Dixon *versus* Willows. Mich. 8 Will. III.

(1.) **U**PON a Motion in Arrest of Judgment, after a Verdict upon an Indebitatus Assumpsit for 13 l. 10 s. for nine Guineas, without saying ad valorem: It was held, that the Broad-Peices were in Effect the first Guineas coined in England for 20 s. and went at that Rate for some Time; but the Value of Gold rising, these Broad-Peices were made current by Proclamation at 1 l. 1 s. 4 d. and tho' there was afterwards a second Rise in the Price and Value of Gold, yet there was no Proclamation to raise the Value of these Pieces in Proportion to the Value of Gold. But afterwards, when Guineas were coined, they were made in Respect to the Value set upon Broad-Peices by Proclamation, as aforesaid; tho' there is no Act of Parliament or Order of State for these Guineas as they now are taken, yet being coined at the Mint, and having the King's Insignia on them, they are lawful Money, and current at the Value they were coined and utter'd at the Mint.

2 Salk. 416.

(2.) Af-

1 Lev. 58.

(2.) Assumpsit for several Particulars, amounting in all to 70 l. but by Miscasting it was alledged to amount to 90 l. per Curiam, should the Jury give above 70 l. the Verdict would be naught, if under 70 l. 'tis good.

2 Lev. 4.

(3.) Debt for Rent, and the Plaintiff demanded less than due, adjudged ill after a Verdict; the Case was, that the Year's Rent amounted to 60 l. and the Plaintiff declaring for the Arrears for one Year and an Half, demanded 80 l. whereas it came to 90 l. See Cro. Eliz. 22. contra.

2 Lev. 57.

(4.) In Covenant, and a general Demurrer to the Declaration, for that the Plaintiff demanded more than appeared to be due, upon the first Breach, and less upon the second. Et per Curiam, the first may be cured by the Plaintiff's Release, or by the Verdict upon the Writ of Inquiry finding less; and as to the second, 'tis well after Verdict, or upon a General Demurrer, but not upon Special Demurrer, and shewing it for Cause.

M O R T G A G E.

Gory's Case. Hill. 9 Will. III. in Cancellaria.

(1.) **D**Ecreed by the Lord Chancellor Somers, that where a Mortgagee lends more Money upon Bond to the Mortgagor, he shall not redeem unless he pay the Principal and Interest due on the Bond, as well as on the Mortgage. But if he mortgage the Equity of Redemption to another, the second Mortgagee shall not be affected with this Bond, because 'tis but a personal Charge upon the Mortgagor. Et per Holt Ch. Just. if a Purchaser pay the Money to the Mortgagee, he (the Mortgagee) is become a Trustee for the Purchaser.

(2.) One having the Reversion in Fee expectant upon the Determination of a Lease for Life, in an Estate worth 1000 l. per Annum, conveys it in Fee to W. R. in Consideration of 1000 l. and no more, the Tenant for Life dies, and now the Conveyance to W. R. is pretended to be no more than a Mortgage, because he had declared, That he did not know how long he should enjoy the Estate, and that he would take his Money again, with Interest: Sed dubitatur per Curiam, because W. R. had no Remedy to recover his Money; and where a Mortgagee cannot compel the Repayment of his Money, the Mortgagor shall not enforce a Redemption, for the Remedy ought to be reciprocal; and besides, Matter subsequent will not make it a Mortgage, if it was not so upon the original Agreement.

1 Ch. Rep. r.
Where a Mortgagee cannot have a Remedy to recover his Money, the Mortgagor cannot compel a Redemption.

(3.) Where a Mortgagee assigns the Mortgage, all Money really paid by the Assignee, if due at that Time, shall be accounted Principal as to the Mortgagor, whenever he comes to redeem.

1 Ch. Rep. 68.
Where a Mortgagee assigns, all the Money then due shall be Principal.

(4.) When the Heir of the Mortgagee is to reconvey the Estate mortgaged, and there is no Defect of Assets in the Hands of the Executor, the Redemption-Money shall be paid to the Heir, if the Condition was to pay it to him; so if it was to pay it to the Mortgagee, his Heirs or Assigns; so it is if it was to be paid to his Heirs or Executors; but 'tis otherwise, if it was to be paid to the Executors only.

1 Ch. Rep. 83.
Redemption-Money to be paid to the Heir, if no Defect of Assets in the Executor.

(5.) Mortgagee, where the Mortgage is forfeited, shall have Interest for his Interest; and so shall an Assignee, for all Interest due from the Time of the Assignment.

Postea 7.
1 Ch. Rep. 258.
Where a Mortgagee shall have Interest for his Interest.

(6.) Mortgage to W. R. and his Heirs; but that they should reconvey, if the Mortgagor, his Heirs, Executors or Administrators should repay the Principal Sum and Interest to the said W. R. his Heirs, Executors, Administrators or Assigns; the Mortgagee died, and the Mortgage being forfeited, the Question was, whether the Heir of the Mortgagee, or his Executors, should have the Redemption-Money, for the Heir was to reconvey, and there was no Defect of Assets in the Executors Hands; and by the Condition it was limited to the Heir as well as to the Executor. Adjudged, that Equitas sequitur legem as near as may be; now if the Condition had been to repay, without mentioning to whom, in such Case the Executor should have the Money; because it first came out of the personal Estate; but the

1 Ch. Rep. 283.
Where the Redemption-Money shall be paid to the Heir, and where to the Executor.
Antea 5. S.P.

Benefit of Redemption being forfeited in Law, 'tis all one in a Court of Equity, as if neither Heir or Executor had been named; and therefore in that Case Equity will appoint the Executor to have it, because the Right of the Mortgagee was only to the Money, for which the Land was no more than a Security, and as his Right to the Land was in that Respect only, therefore the Money is personal Estate, and must come to the Executor; but where the Condition appoints the Money to be paid either to the Heirs or Executors in the Disjunctive, and the Mortgagee comes at the Day, he hath his Election by Law to pay it to either; and all Mortgages belong to the personal Estate, tho' made in Fee.

N O B I L I T Y.

The King versus Knollis. Trin. 6 Will. III. B. R.

1 Salk. 509.
Where Nobility was
pleaded in
Abatement
to the Writ.

(1.) **T**HIS Case is reported in 2 Salk. but it was as followeth: The Defendant was indicted by the Name of Charles Knollis Esquire, at Hicks's Hall, for Murder, which Indictment being removed into B. R. by Certiorari he pleaded in Abatement, that William Knolls, Viscount Wallingford, was by Letters Patents under the Great Seal of England, which he produced in Court, created Earl of Banbury, to him and the Heirs Males of his Body; that he died, and that the Honour descended to Nicholas Knolls his Son and Heir, who died, and the Honour descended on the Defendant, Son and Heir of the said Nicholas. Et hoc paratus est verificare. The Attorney-General replied, that the Defendant on such a Day petitioned the Lords in Parliament to be tried by his Peers, and that they upon Consideration thereof, dismissed his Petition, and disallowed his Peerage; and upon a Demurrer to this Replication, these Exceptions were taken to the Plea.

(1.) Because it doth not conclude prout patet per Recordum.

(2.) That there ought to have been a Writ to certify the Descents.

(3.) That

(3.) That the Plea ought to have averred Banbury to be in England.

(4.) That the Defendant did not plead, that he was unus parium Regni Angliæ.

(5.) That this Plea is avoided by the Replication, that the Defendant was barred of his Peerage by the Order of the House of Lords.

Which Objections were thus answered.

(1.) And first the Court held, that here being Descents pleaded, which are Matters of Fact, for that Reason prout patet per Recordum would have been a very improper Issue, and that Earl or no Earl could not have been an Issue in this Case, but non concessit only, because the Letters Patents are set forth upon Record, and therefore they held Nobility in this Case triable per Pais; so where Nobility is gained by Matter of Fact, 'tis triable as aforesaid, as for Instance, where 'tis gained by Marriage; but where 'tis by Writ only, or by Patent, without Descents, 'tis not triable but by Record, and in such Case the Plea must conclude prout patet per Recordum, and so are the * old Books to be intended.

* 22 Affise 24.
Br. Affise
240.

(2.) As to the second Objection, a Writ to certify the Descents is only cautionary and not necessary.

(3.) They held, that the Defendant need not aver Banbury to be in England, for it will be intended that it was; besides, an Earldom consists in Dignity and Office, and 'tis not material whether the Place be in England or not, as for Instance, there is no such Place as Rivers, or Albemarle in England, and yet there are such Earls; for the Great Seal, which necessarily relates to England, makes them English Peers; 'tis true, the King may create an Irish Peer under the Great Seal, but that must be by express Words in the Patent.

(4.) The Defendant needs not aver, that he is unus parium Regni Angliæ, because he appears to be so by Letters Patents now produced; and as to that Matter, Eyre Justice took this Difference, (viz.) where Peerage is claimed * ratione Baronii, as by a Bishop, he must plead, that he is unus parium Regni Angliæ, but where the Claim is ratione nobilitatis, he needs not plead otherwise, than pursuant to his Creation.

4 Inst. 15.

(5.) It was adjudged, that the Order of the House of Lords did not take away the Defendant's Peerage, nor conclude him, because his Cause was not properly before them; * the Course is where a Man is disturbed in his Title, to Petition the King, who indorses the Petition and sends into Chancery.

* Stamf.
Præf. 72.
22 Ed. 3. 5.
L. quinto
Ed. 4. 117.

The Dignity of Peerage may be forfeited by Attainder, but it cannot be surrendered or transferred by Fine.

(2.) A personal Honour, as the Dignity of Peerage may be forfeited by Attainder, for 'tis implied by a Condition in Law, that the Person dignified shall be loyal; and this Dignity after Attainder cannot descend, because the Blood by which it is to descend is corrupted; such Dignity cannot be surrendered, or transferred by Fine, for 'tis a Quality affixed to the Blood, and so merely personal, that a Fine cannot touch it; besides, if it was permitted, it would draw the Trial of Peer or no Peer into the Court of Common Pleas, which is determinable only in Parliament, (viz.) in the House of Peers.

NOLLE PROSEQUI.

The Serjeant's Observations upon this Title, and upon a *Retraxit*.

Difference between a Nonsuit and *Retraxit*.

(1.) A Nonsuit is where the Plaintiff ought to appear but makes Default, but a *Retraxit* is where the Party is in Court and makes Default.

Nonsuit is never peremptory before Appearance.

(2.) A Nonsuit is either before Appearance, at the Return of the Writ, or after, at some Day of Continuance, for the Plaintiff is always the first Agent, but 'tis never peremptory before Appearance; 'tis true, after Appearance, and in some Cases, 'tis peremptory, as in Appeals, Quare Impedit, and Attaints, &c.

Where the Nonsuit of one is the Nonsuit of all.

(3.) In personal Actions, the Nonsuit of one is the Nonsuit of all the Plaintiffs, except in some Cases, where Summons and Severance is allowed; 'tis so in Trespals, and 'tis so in Debt, as for Instance, if an Action of Debt is brought against A. B. and C. by several *Præcipe's*, a Nonsuit quoad A. is a Nonsuit quoad the other two, but 'tis otherwise in a Discontinuance.

(4.) So where an Action of Debt was brought against three Co-heirs, two of them confessed Assets, and being at Issue with the Third, the Plaintiff was Nonsuit, this shall enure to all. See Sid. Blake's Case.

(5.) At Common Law, upon every Continuance or Day given, the Plaintiff might be Nonsuit, so that even after a * Verdict, * 1 Inst. 139.b. if the Court took Time to consider and be advised, the Plaintiff was demandable and might be Nonsuit; but this is now remedied by the Statute 2 H. 4. yet after a * Privy Verdict the Plaintiff * Dyer 53. may still be Nonsuit, and so he may after a Special Verdict found, because the Matter was argued, and so he may after a Demurrer, tho' the Matter was argued, if the Court give a Day over, for the Plaintiff is then demandable.

(6.) As to a Retraxit the Rule is, Qui semel actionem renuncia- vit amplius repetere non potest, therefore a Retraxit is a Bar to any Action of equal Nature brought for the same Cause or Duty, but a Nonsuit is not.

(7.) A Retraxit must be always in Person, for the Entry is Venit & fatetur se nolle ulterius prosequi, and therefore, if 'tis by Attorney, 'tis Error. 8 Rep. 58. in Beecher's Case.

(8.) Two joint Obligors, one was sued, and as to him a Re- traxit was entered, and afterwards the Obligee brought an Action of Debt against the other, who pleaded this Retraxit in Bar to that Action; and the better Opinion was, that it was a good Bar. 1 Cro. 551.

Goddard versus Smith. Mich. 3 Anna.

(9.) **T**here is a short Note of this Case in 2 Salk. but the Case was as followeth:

M. W. R. being indicted for Barrettry, the Attorney-General entered a Non prof. (viz.) Quod attorn' generalis Dominae Reginae, ipsum inde non vult ulterius prosequi, whereupon W. R. brought an Action on the Case against the Prosecutor, for a false and mali- cious Indictment prosecuted against him (the Plaintiff) Et quod fuit debito modo inde exoneratus, and at the Trial gave this Non prof in Evidence: Sed per Curiam, it ought to be an Ac- quittal upon the Merits of the Cause, which was never tried in this Case, and there was no Default in the Defendant in not ha- ving it tried: Et per Holt Ch. Just. this is no Discharge, 'tis only putting the Defendant sine die, the Attorney may take out new

2 Salk. 456.
Where a
Non prof. is
no Dis-
charge.

new Process if he will: Sed per Harecourt, Clerk of the Crown-Office, it was never yet done, Non Pros's have been frequent upon Informations, but never upon Indictments, till the Reign of Car. 2. and the Court thought it hard that the Attorney-General should allow them.

Cree versus Rolls. Pasch. 13 Will. III.

Where a *Non Prof.* may be entered, where not.

(10.) **I**N A Judgment against two Defendants; afterwards, at the Nisi prius, the Plaintiff entered a Retraxit against one of them, and the Cause was tried against the other; adjudged, that before the Record is sent down by Nisi prius, either before or after Issue joined, the Plaintiff may enter a Non Prof. against one Defendant where they sever in their Pleas, but where they do not sever the Plaintiff cannot enter a Non Prof. as to one of them.

(2.) That there cannot be a Non Prof. at the Trial at the Assizes.

N O T I C E.

1 Roll. Rep. 469. *contra.*
1 Vent. 78.
Where special Notice must be given.

(1.) **W**here a Promise was made to pay the Plaintiff 20l. upon his Return from Hamburg, the Plaintiff must give Notice of his Return, and alledge it specially in his Declaration.

2 Lev. Williams v. Fry.
Where a Person is bound to take Notice of a conditional Limitation.

(2.) Devise to his youngest Daughter in Tail, provided, that if she marry without the Consent of W. R. then to his second Son in Tail; the Daughter married without the Consent of W. R. and the second Son entered, and both are found to be Infants, and also that the Daughter had no Notice of the Condition: adjudged, this is a conditional Limitation, and that the second Son might enter, and that Want of Notice will not excuse the Daughter, because no one is bound to give her Notice; and as she takes Notice of the Estate devised to her, so she is bound to take Notice of the Condition upon which she takes it; but 'tis otherwise where the Devise is to the Heir at Law upon such a conditional Limitation, because he may enter generally, as Heir, not knowing there was a Will.

(3.) Where a Man covenants to make W. R. such an Estate in D. the Covenanter ought to give Notice to W. R. what Manner of Conveyance he intends; that if it be a Feoffment, W. R. may be ready on the Land to take Livery and Seisin. 1 Vent. 447.

(4.) So where a Man covenants to levy a Fine to W. R. the Covenanter must give Notice whether, he intends to levy it in Court, or by Dedimus. 1 Vent. 143.

(5.) an Award, that A. shall make B. a Lease, &c. within six Months following, and that upon making thereof B. shall pay the other 50l. A. needs not give Notice when he will make the Lease.

(6.) One married a City Orphan in Surrey, knowing her to be such; adjudged, that he is punishable, because he is bound to take Notice, that she was a City Orphan, and the rather, because no Body is bound to give him Notice. 1 Vent. 150.

N U S A N C E.

Arnold *versus* Jefferson. Mich. 9 Will. III.

(1.) **I**N this Case it was held, per Holt Ch. Just. that an Affise 2 Salk. 654.
or Quod permittat, &c. Quare erexit quædam edificia is Affise where
good, for there may be a Building without a Proper Name; it 'tis good,
lies de * Fabrica, which is a Word more uncertain than Edificia, where not.
yet it will not lie * de mole, because the Thing it self is not to be * N. B. 184.
recovered as in a Præcipe. * 3 Cro. 402,
580.

(2.) Stopping of Lights is a Nuisance, but Stopping a Prospect 1 Mod. 54.
is not; as for Instance, one who had an House and Lights Time Stopping
out of Mind, the Neighbour and Owner of the next Field built Lights where
a Shed, which stopped the Lights, and then made a Lease there- 'tis a Nu-
of to W. R. against whom the Plaintiff brought an Action for sance, and
this how to be a-
bated.
1 Roll. Rep.
22.

this Nufance. Et per Curiam, admitting he might have an Affise of Nufance againft the Builder, yet he cannot have an Action againft his Lefsee, becaufe it would be Waffe in him to pull down the Shed and abate the Nufance; but the Plaintiff may ftand on his own Ground and abate it. Et per Curiam, where the Thing done is a Nufance per intervalla, as a Cock, or Pipe or Gutter an Adion lies againft the Lefsee, becaufe every freſh Running is a freſh Nufance; yet if W. R. have a Way over the Ground of W. W. and he ftops that Way, and then demifes the Ground to C. an Adion lies againft the Lefsee, for continuing this Nufance.

2 Cro. 491.
5 Rep. 104.
2 Roll. 193.
2 Roll. Rep.
3. 30. *contra*.
Who may
build a
Pidgeon-
houſe, who
not.

(3.) A Lord of a Manor may build a Dove-Cote upon his Land, Parcel of his Manor, and this he may do by Vertue of his Right, as Lord thereof; but a Tenant of the Manor cannot do it without Licence, for he can have no Right to any Privilege that may be prejudicial to others; but this is not a Common Nufance, nor puniſhable in the Leet; but the Nufance being particular, the Lord ſhall have an Adion on the Caſe, or an Affise of Nufance, as he may for building an Houſe to the Nufance of his Mill.

O A T H.

Cro. Eliz.
486.
Difference
where the
Oath is to do
a Spiritual
and Tempo-
ral Thing.

(1.) **A** Sumpſit, &c. in Caſe he would make Oath before ſuch a Perſon, he promiſed, &c. Et per Curiam, Oaths are either by Compulſion or Voluntary, and a Voluntary Oath by the Conſent and Agreement of the Parties, is lawful; and in ſuch Caſe, if 'tis to do a Spiritual Thing, and the Party fail, he is ſueable in the Eccleſiaſtical Court, pro laſione fidei; and if 'tis to do a Temporal Thing, he might formerly be puniſhed in the Star-Chamber, if he failed, and now in B. R.

Hilton *verſus* Byron. Paſch. 11 Will. III. B. R.

Quakers ſo-
lemn Affir-
mation not
allowable in
criminal
Caſes.

(2.) **T**HE Plaintiff Hilton being a Quaker, moved for an Attachment againſt Byron, offering to make his Solemn Affirmation, according to the late Act, that he went in Danger

Danger of his Life. Sed per Curiam, it was denied, unless he would take his Oath in Common Form, for this being a Criminal Proceeding, 'tis out of the Statute.

Hippesley versus Tuck.

(3.) **A** Writ of Error was brought upon a Judgment in an Inferior Court, of which Court the Mayor of the Corporation was Judge, and the Error assigned was, that he had not taken the Oaths pursuant to the Statute 25 Car. 2. by which his Office of Mayor is made void, for not taking the Oath, and by Consequence the Judgment was coram non iudice; it was insisted in Support of the Judgment, that this is not assignable for Error, because 'tis contrary to the Record, by which he is admitted to be Judge. Sed per curiam, the Statute makes the Office void, as to Jurisdiction; and therefore this is assignable for Error, tho' contrary to the Record.

2 Lev. 184.
T. Jones 81.
Where Error may be assigned contrary to the Record.
13 Car. 2.
cap. 1.

(4.) But since it hath been adjudged otherwise in a parallel Case. A. Error of a Judgment in an Inferior Court, for that the Sheriff who heard the Cause, and was Judge of the Court, had not taken the Oaths: The Defendant pleaded, that the Oaths were not tender'd to the Sheriff; and upon a Demurrer to this Plea, it was adjudged good, because the Statute requires, that the Oath and Declaration should be tender'd to him to subscribe, and the Tender is traversable.

2 Lev. 242.
Denning v.
Norris.

O F F I C E.

Saunders *versus* Owen.

2 Salk. 467.
5 Mod. 386.
Of a Custos
Rotulorum
and a Clerk
of the Peace.

* 34 Ed. 3.
cap. 1.

* 1 Will. 3.
cap. 21.

(1.) **I**n arguing this Case, which was upon a Writ of Error to reverse a Judgment in Assise for the Office of Clerk of the Peace to the Justices of Kent, it was held, that Anno 12 Rich. 2. The Clerk of the Peace was called, the Clerk of the Justices, from which it may be inferred, that at that Time there was no Custos Rotulorum, but all Proceedings at the Sessions were kept by the Justices; that when by the Statute * 34 Ed. 3. their Proceedings came to be recorded, it was then necessary to have a proper Officer who should be responsible for the Rolls, and this was the Custos Rotulorum, who then had Power to appoint a Deputy, as incident to his Office, and this is the Clerk of the Peace: But this being found to be a profitable Office, the King did usually dispose it; therefore to prevent such Disposals, this Office was annexed to the Custos Rotulorum by the Statute 37 H. 8. and since that Statute the Custos hath always put in the Clerk of the Peace, appointing him to hold the same durante placito suo; so that he was removeable at Will, till by the Statute * 1 Will. 3. he had a more fixed Estate, which is quam diu se bene gesserit.

Sir Robert Atkins *versus* Mountague.

1 Chan. Rep.
What Office
cannot be
granted in
Reversion.

(2.) **E**leanor, Queen Dowager of H. 3. endowed St. Catharine's Hospital near the Tower, reserving to her self, Et Reginis Angliæ nobis succedentibus plenam potestatem of providing a Master thereof: The Queen Dowager in the Reign of Car. 2. nominated a Master, and Queen Consort taking that Nomination to be void, she nominated another; it was insisted, that such a defultory Inheritance as this was, (viz.) Reginis Angliæ nobis succedentibus, could not be good by Charter, without an Act of Parliament. But per Curiam, This is very true, if it had been a Grant of Advowson in Esse, or of Lands, because he who had a Right could not always know against whom to bring his Action; but

but of a Patronage newly founded there can be no precedent Right, therefore it may be limited at Pleasure, like a Rent de novo.

(2.) It was held, that this Office of a Master could not be granted in Reversion, and that the Right of granting it was in the Queen Dowager and not in the Queen Consort, unless there was no Queen Dowager.

Anonymus.

(3.) **P**ER Curiam: The Office of Marshal of the King's Bench cannot be granted to one for a Term for Years absolutely, because in such Case it might go to an Executor or Administrator.

Office of Marshal of B. R. cannot be granted for a Term for Years.

But it may be granted to one for ninety-nine Years, if he shall so long live, because there can be no Inconvenience in such a Grant, and the present Marshal succeeded Sutton by Vertue of such a Lease.

Godolphin *versus* Tudor. Mich. 3 Annæ.

(4.) **S**IR William Godolphin being Auditor of Wales for Life, made the Defendant his Deputy, quam diu se bene gesserit, and by Articles of Agreement between them, he the said Defendant, in Consideration of the said Deputation, did covenant to pay to Sir William Godolphin 200 l. per Annum, and to save him harmless, &c. and entered into a Bond for Performance of those Articles; and in an Action of Debt brought on that Bond, the Breach assigned was for Non-payment of 200 l. per Annum for so many Years; the Defendant pleaded the Statute* of Ed. 6. there was a Replication, and a Rejoinder and Demurrer: And per Curiam, this is an Office within the Statute, but adjudged, that where the Salary is certain, in such Case, if the Principal maketh a Deputation, reserving a lesser Sum out of that Salary, such Deputation is good notwithstanding the Statute, so if the Profits are uncertain arising from Fees; if the Principal makes a Deputy, reserving a Sum certain out of the Fees and Profits of the Office, 'tis good; for in those Cases, if the Fees will not answer the Reservation, the Deputy is not to pay: And tho' a Deputy, by his Constitution, is intrusted with the whole Office of his Principal, yet he hath no Right to the Salary or Fees, for they still belong to the Principal; so that whatever he reserves to be paid out of them, is only a Reservation of what was his before, and giving away the Surplus to another; but where the Reservation or Agreement is to pay generally, but not out of the

Mod. Cases 234.
Where a Deputation is good, where not.

* 5 & 6 Ed. 6. cap. 16.

Profits, the Sum reserved must be paid at all Events, and in such Case 'tis void by the Statute.

Hutchins Serjeant's Case. Pasch. 5 Will. III.

King's Serjeant made Commissioner of the Great Seal, his Patent as King's Serjeant is determined.

(5.) **H**utchins being made King's Serjeant by Patent, during Pleasure, with a Salary of 40l. per Annum, was afterwards made one of the Commissioners of the Great Seal, which Commission being afterwards dissolved, the Question was, whether he should still take Place as King's Serjeant; and by the Opinion of all the Judges, his Patent of King's Serjeant is determined, because his Commission put him into an Office of Judicature, which is inconsistent with the Service and Duty of his Office to be performed as King's Serjeant, and 'tis the same as if he had been made Lord Keeper or a Judge.

2 Vent. 270. Where an Archdeacon forfeits his Right to grant the Office of a Register, the King shall have it.

(6.) If an Archdeacon forfeits his Right to grant the Office of Register, per 5 Ed. 6. against the Sale of Offices, the King shall take the Advantage of that Forfeiture without Office found, for it was neither in the Archdeacon nor in the King as an Estate, but only a Power to nominate to the Office; 'tis like a Chose in Action, and the present Vacancy is a Chattel separate from the Inheritance.

2 Lev. 151. Offices in Fee are not within the Statute 5 & 6 Ed. 6.

(7.) Tenant for Life of the Bailiwick of the Savoy from the Crown, made a Lease thereof for a Year to an Under-Deputy, and adjudged good; for by the Statute 5 & 6 Ed. cap. 16. all Offices of Fee are excepted, and so are all Sub-grants and Sub-demises thereof.

1 Roll. Rep. 274 Constable may make a Deputy.

(8.) In false Imprisonment, the Defendant justified as Deputy to a Constable; it was objected against this Plea, that a Constable could not make a Deputy, for he is sworn to his Office, and cannot give his Oath to his Deputy: Sed per Curiam, a Constable is but a ministerial Officer, therefore he may make a Deputy, for he may be sick, and so not able to execute his Office in Person, but Returns must be made in the Name of the immediate Officer, and so they must in all ministerial Offices, but not in judicial.

O R D E R S.

Harrison *versus* Lewis.

- (1.) **M**Oved to quash an Order made at the Quarter-Sessions in Coventry; the Case was, Lewis, with his Wife and Children were settled in the Parish of A. and from thence they removed to the Parish of B. where the Husband gained a Settlement; but the Parish of A. having given a Certificate to the Parish of B. that they (the said Parish of A.) would receive them again when-ever Lewis should become chargeable to B. and he now being chargeable, they obtained an Order from two Justices to send him and his Wife and Children to A. again, which Order was confirmed upon an Appeal to the Sessions, and he was sent thither accordingly, but the Order was quashed; for tho' it was according to the Agreement made between the two Parishes, yet a private Agreement in this Case shall not alter the Law.

A poor Man coming with a Certificate into a Parish shall not go back to the Parish who certified, if he hath gained a Settlement elsewhere.

The King versus Parish of St. Nicholas in Abingdon.

- (2.) **O**NE Dickinson was an Inhabitant of the Parish of St. Helens in Abingdon, where he had four Children, and removed from thence into the Parish of St. Nicholas, where he lived some Time, and was taxed to the Poor there, but was removed back to St. Helens before he paid the Tax, and there he died, afterwards his Children were by Order of the Justices removed into the Parish of St. Nicholas, for that their father had gained a Settlement there, by being * taxed to the Poor, and this by Vertue of the Statute 3 & 4 Will. 3. But per Curiam, there must be Paying as well as Taxing, to make a Settlement by that Statute.

Taxing alone, without paying, will not make a Settlement.

* Statute 3 & 4 Will. 3.

The King versus Inhabitants of Winsly.

Sessions must either affirm or reverse an Order.

Postea 6. S. P.

(3.) **O**NE Mary Tully, a poor Woman, was by Order of two Justices removed from Beverley to Naseborough in the West-Riding of Yorkshire, that being adjudged by them to be the last Place of her legal Settlement; Naseborough appeals to the next Sessions, and thereupon an Order was made, reciting the Difference between Beverley and Naseborough, but that it appeared to them, that this Woman was last legally settled at Winsly, which was a third Parish not concerned before, and so she was by that Order removed to Winsly, but it was quashed, because the Sessions had no Jurisdiction, but only to affirm or reverse the Order between the contending Parishes, and not to make an Order to charge a third Parish.

Wootton Rivers versus St. Peter's Marlborough.

2 Salk. 492.

5 Mod. 149.

Objected against an Order,

that it did not set forth,

that the Person removed did

not rent 10 l.

per Ann. and

that it doth

not say it

was made up-

on the Com-

plaint of the

Parish-Offi-

cers, quash-

ed for the last

Objection.

* Cap. 12.

(4.) **T**HIS Case is reported in 2 Salk. but it was as followeth, (viz.) An Order was made by two Justices to remove a poor Woman from the Parish of Wootton Rivers to the Parish of St. Peter in Marlborough, that being the last Place of her legal Settlement, which Order being removed into B. R. by Certiorari, these Objections were made against it.

(1.) 'Tis not said that the Woman was Poor, but only that she was lame and likely to become Poor.

(2.) 'Tis not said, she did not give Security, upon giving which she is not to be removed by the Statute * 13 & 14 Car. 2.

(3.) 'Tis not said, that she did not rent a Tenement of 10 l. per Annum.

(4.) The Order was made upon Complaint to the Justices, but doth not say, upon Complaint of the Church-wardens or Overseers of the Poor.

But the two last Objections were chiefly insisted on to quash this Order.

Now, as to the Renting a Tenement of 10 l. per Annum: Per Holt Ch. Just. before the Statute 13 Car. the Justices of Peace removed poor People by Consequence of Law, upon the Statute 43 Eliz. because 'tis provided by that Statute, that every Parish should maintain its own Poor, therefore they considered who were properly the Poor of a Parish, and those were such as were settled a convenient Time in a Parish, and that a Month was a convenient Time to make a Settlement: But there being

several

several Doubts made about this Matter, therefore to settle the same, the Statute before mentioned was made; upon which Statute this Question now arises (viz.) since the Power to remove a poor Person being not wholly founded on the Statute 13 & 14 Car. 2. but on the Law as it was before the making that Statute, whether such an Order as would serve for a Removal before that Statute, would serve since, or whether the Statute obliges the Justices to alter the Form of their Orders; and this depends upon the Operation of the Statute, whether it was by Way of Jurisdiction or Restriction, and upon Searching of Precedents by the Secondary he found, that the Orders before this Statute were all without this Clause, and so were the Orders since, whereupon as to this Point this Order was held good, and if the Fact is, that the Person removed doth rent a Tenement of 10 l. per Annum, it ought to be remedied by Way of Appeal to the Sessions.

But as to the last Exception, that this Order was made upon Complaint only, and not upon Complaint of the Churchwardens, &c. this was held fatal; whereupon the Return of the Certiorari was read, and there it appeared, that the Order was made upon the Complaint of the Churchwardens and Overseers of the Poor, upon which it was urged, that this Omission and Defect in the Order it self, should be supplied and made good by the Return of the Certiorari. But per Curiam, no Man can disturb another coming into a Parish, but he or they who have Authority so to do; a Complaint ex officio to a Justice of Peace, is not sufficient, for it may be, that the Parish is willing, and do desire to have the Party amongst them; and if that be the Case the Justices cannot remove him; and tho' upon the Return of the Certiorari 'tis set forth, that this Order was made upon the Complaint of the Churchwardens and Overseers of the Poor, yet that will not supply the Omission in the Order itself, because the Justices had exercised their Authority before the Return was made, and they had no Power to make such a Return; they should only have returned the Order in hæc verba, for which reason this Order was quashed.

Scrivenham Parish versus St. Nicholas.

(5.) **A**N Order to remove a poor Person was quashed, because it was not said, that he was Poor, or likely to become chargeable to the Parish, &c.

Order quashed, for that it did not set forth, that the Person was Poor, &c.

The King versus Inhabitants of Oking.

5 Mod. 208.
2 Salk. 473.
Where the
Husband is
settled, the
Wife and
Children
must likewise
be settled
there.

(6.) **O**N James Tully, his Wife and Children, were removed, by an Order of two Justices, from Oking to Horswell, who appealed to the next Sessions, and there an Order was made to supersede the Order of the two Justices, and for that it did not appear to them, that the said James Tully (saying nothing of his Wife and Children) had a Settlement at Horswell, therefore they order him, and his Wife and Children, to be removed to Oking: These Orders being removed by Certiorari, it was objected, that the Order appeared to be made by the Justices, &c. at the Sessions holden for the County of Surrey at Kingston upon Thames, and it doth not appear by the Order, that Kingston was in the County of Surrey; but the Word Surrey being in the Margin, this Objection was over-ruled: The next Objection was, that it doth not appear by the Sessions Order, but that the Wife and Children might be settled at Horswell, for it only sets forth, that James Tully had no Settlement there, which may be true, for he may be a Magabond, and yet his Wife and Children may be settled there, the one by having a Freehold, and the other by being Apprentices; but per Curiam, this Exception was disallowed; for wherever the Husband is settled, there the Wife must likewise be settled. In the next Place it was objected, that the Sessions having only Power to * repeal or affirm, but not to supersede the Order of two Justices. Per Curiam, Superseade is not a proper Word, there is a Difference between a Superseadeas and a Repeal; a Commission of Oyer and Terminer may be superseded, and revived by a Procedendo without granting a new Commission, but that cannot be done in Case of a Repeal; yet this Word is commonly used amongst Justices of Peace upon such Occasions; therefore they would not quash it, but referred it to a Judge of Assize.

* Sessions
have Power
to affirm or
repeal, but
not to super-
seade an Or-
der.
Antea 3. S. P.

The King versus St. Ollave's Parishioners.

Order of Re-
moval
ought to be
directed to
the Officers
of both Pa-
rishes.

(7.) **U**PON a Certiorari two Orders were returned; the first was an Order made by two Justices, for the Settlement of a poor Man, Thomas Gill, in such a Place, and the other was an Affirmation of the first Order upon an Appeal to the Sessions: The first Order recited, that whereas Complaint hath been made unto us, that Thomas Gill of the Parish of St. Ollave, had lately intruded himself into the Parish of St. George, &c. We adjudge him to be lawfully settled in the Parish of St. Ollave; these are therefore to require you, and every of you,

to convey the said Thomas Gill to the Parish of St. Ollave; and the Order was directed to the Churchwardens and Overseers of the Poor of the Parish of St. Ollave, for which Reason it was quashed; for the Order ought to be directed to the Parish Officers, from whence the Person is to be removed; and to the Officers of the Parish, who are to receive him only.

Luckington versus St. Austin's Parish.

(8.) **T**HE Case was, Simon Howell was settled at Luckington in Wilts, but afterwards he and his Wife came into the Parish of St. Austin in Bristol, where he lived some Time, and had a Child born there, which Child was now under the Age of seven Years; the Father went to Sea, and there died, the Mother returned to Luckington, and there she died; two Justices made an Order to send the Child to Luckington, that being the Place where the Father was settled, which Order was confirmed upon an Appeal; but Mr. Northey moved to quash this Order of Sessions, because the Child must be sent to the Place where it was born, unless it can be sent to his Parents, where they are settled, which could not be done in this Case, because they were both dead.

Where Parents are dead the Child must be settled where born.

Tudy versus Padstow. Pasch. 9 Will. III.

(9.) **A**N Order made by two Justices for settling a poor Man at such a Place, was quashed at the Sessions; but because it did not appear, that it came before them by Way of Appeal, the Order of Sessions was quashed, for they have not Original Jurisdiction, but it must be brought before them by Appeal.

Sessions have no Jurisdiction but by Appeal.

Bayly's Case. Hill. 10 Will. III.

(10.) **A** Maid Servant before the 25th of March 1707, was an Inhabitant legally settled at Overton in Hampshire and then contracted with one John Orpewood, an Inhabitant of Steventon, for so much Wages, to serve him from the said 25th Day of March till Michaelmas following, which she did accordingly, and then made a new Contract with the same Master, to serve him for a longer Time, and accordingly did serve him upon that Contract till April following, in all above a Year. And per Curiam, tho' this was not an entire Contract for a Year, yet it gained her a

Where the Service was for more than a Year, tho' not upon one Contract, yet 'tis a Settlement.

Settlement at Steventon, according to the Statute 9 Will. 3. cap. .

The Queen versus Branworth. Mich. 3 Anna.

Mod. Cases
240.

A Man is
not indict-
able for be-
ing a Va-
grant.

* Cap. 27.

(11.) **B**Ranworth was indicted at Portsmouth, for wandring up and down there to sell Wares as a Petit Chapman; and it was urged, that any Petit Chapman is a Vagrant within the Statute 13 Eliz. if not exempted and qualified within the Statute * 9 & 10 Will. 3. and that the Statute before mentioned did not extend to Boroughs or Corporate Towns, so that as to these Places a Petit Chapman remained as he was before (i. e.) a Vagrant, Sed per Holt Ch. Just. A Man was not indictable for being a Vagrant; but if he was suspected to be, or really was, a loose and disorderly Person, he might be taken up and bound to his good Behaviour, and by the Statute of Labourers, he might be put to Work, or be compelled into Service.

Spencer's Case. Hill 8 Will. III.

Appeal must
be to the
next Sessions.

(12.) **A**N Order was made by two Justices, to remove Spencer from Hinckley in Leicestershire to Rochby in Warwickshire, who appealed, and at the adjourned Sessions, the two Parishes agreed to put off the Determination of the Cause till the next Sessions, which Sessions vacated the Order of the two Justices; and now it was moved, to set aside that Order, because the Appeal ought to be at the next Sessions, per Statute 13 Car. 2. and 3 & 4 Will. 3. there to be finally determined; and for this Reason it was quashed.

Elizabeth Ashley's Case. Pasch. 9 Will. III.

1 Salk. 479.
Order made
by two Ju-
stices, tho'
not of the
Division,
good.

(13.) **T**WO Orders were removed by Certiorari, the Return whereof was quashed, because the Return in the Schedule annexed to the Writ, was not made by two Justices, but by the Clerk of the Peace, who was not the Person to whom the Certiorari was directed, and thereupon a new Certiorari was granted, which being returned and filed, it was objected, that the Order made by two Justices, to remove the poor Man, &c. was naught, because it was not said, that it was made by two Justices of the Division, &c. according to the Statute 13 & 14 Car. 2. But per Curiam, the Statute as to this Matter is only directory, 'tis not restrictive or qualificatory, as the Word Quo-rum is.

Cumner Parish versus Milton Parish. Trin. 2 Annæ.

(14.) **A** Man settled at Cumner, and having several Children born in that Parish, afterwards removed to Milton with his Children, and rented a Farm of 101. per Annum there, by which he gained a Settlement in the Parish of Milton, and becoming very Poor, his Children born in Cumner, were by an Order of two Justices sent thither, (viz.) those who were under seven Years old, the Justices apprehending that the Place of their Birth was the Place of their lawful Settlement, and this Order being removed into B. R. by Certiorari, it was insisted to maintain the Order, that the Children had gained a Settlement in Cumner by Birth, which was not altered or defeated by any subsequent Act of their Father, in gaining a Settlement at Milton, for his Children were with him there only as Nurse Children, and his Settlement shall not be the Settlement of his Children: But per Holt Ch. Just. the Place where a Bastard is born is the Place of his Settlement, unless there is some Trick to charge the Parish; but the Place where legitimate Children are born is not the Place of their Settlement, for let that be where it will, the Children are settled where their Parents are settled, as for Instance, if the Father is settled in the Parish of H. but goes to work in the Parish of B. and before he gains any Settlement there, has a Son born in the Parish of B. and then dies, this Child shall be sent to the Parish of H. for 'tis not the Birth, but the Settlement of the Father that makes the Settlement of his Child; and if the Father hath gained a new Settlement for himself (as he had done in the principal Case) he hath likewise gained a new Settlement for his Children, who do not go with him to his new Settlement as Nurse Children, but as Part of his Family: And to what Purpose is the Father, upon coming into a new Parish, to give Notice of the Number of his Family, but only upon a Supposition that they may gain a Settlement there: But if a Man is settled in the Parish of H. and has Children born there, and dies, and afterwards the Mother of these Children marries a Husband, who is settled in another Parish, the Children shall go along with her, not as Part of her Family, but as Nurse Children, to be maintained at the Charge of the Parish where they were born, and where their Father, whilst living, was settled, and to that Parish they may be sent after seven Years old, as to the Place of their lawful Settlement; for this accidental Settlement of their Mother, which was only by the Marriage with a second Husband, and as she is now become one Person with him, shall not gain a Settlement for her Children.

Mod. Cases
87.
2 Salk. 528.
Children
which are
legitimate
are settled
with their
Parents, and
not where
born.

Mynton Parish versus Stony Stratford. Mich.
13 Will. III. B. R.

2 Salk. 527.
An Order
which is dis-
charged on
an Appeal,
binds only
the contend-
ing Parishes,
but if 'tis af-
firmed on an
Appeal, 'tis
conclusive.
* *Postea* 21.
S. P.

(15.) **A** Poor Man was sent by an Order of two Justices to Mynton, and upon an Appeal to the Sessions, that Order was discharged; then by another Order of two Justices, he was sent to Stony Stratford, and upon an Appeal to the Sessions, that Order was confirmed: Afterwards he was by another Order of two Justices, sent to Mynton again; and per Curiam, this last Order is illegal, for per Holt Ch. Just. where an Order is discharged upon an Appeal, it binds only between the contending Parishes, but where an Order is * confirmed upon an Appeal, 'tis conclusive to all Parties, for 'tis an Adjudication, that the Place to which he was sent is the last Place of his legal Settlement, which can never be avoided but by the Parish against whom it was made; and that a Parish in Reputation is chargeable, if it hath Officers, as Church-wardens, &c.

Anonymus. Mich. 10 Will. III. B. R.

Order to re-
move a poor
Man and his
Family,
quashed.

(16.) **A** Order made to remove a poor Man and his Family from H. to C. was quashed, because all might not be removable; for if a Widow have Children in a Parish where she is settled and marieth a Husband settled in another Parish, if those Children are above seven Years old, they are not to be removed.

Tracy versus Talbot. Trin. 3 Annæ, B. R.

Mod. Cases
214.
2 Salk. 532.
Of Houses
ratable to
the Poor-
Tax.

(17.) **A** Man took Part of an House in the Parish of D. and was rated as an inhabitant of that Parish, &c. and a Discreet was had for that Rate; and in Replevin it was held per Holt Ch. Just. that if two Houses are inhabited by two Families, and there is but one Common Door where both enter, yet, in respect of their Original, which is several, they continue several Houses, and are severally ratable to the Poor, and if one Family goes away, the Part where he dwelt shall be taken as an empty House, but if one House is divided by Partitions, and inhabited by several Families, as for Instance, if the Owner dwells in one Part, and a Stranger in another Part, these are likewise several Tenements, and the Inhabitants thereof severally ratable to the Poor whilst they dwell in those several Tenements; but if the Stranger removes out of his Part, and his Family goes a-

way, then the Whole becomes an entire Tenement, and the Possession thereof is devolved on the Owner, and he is ratable for the Whole as one Tenement, &c.

The King versus Ricelip.

(18.) **T**HIS Case is reported in 2 Salk. but not as 'tis here reported, (viz.) A poor Man was removed from Harrow to Ricelip by an Order of two Justices, which Order was * confirmed upon an Appeal to the next Sessions, so that now he became settled at Ricelip; afterwards the Parishioners of Ricelip discovering that Hendon was the Place of his Settlement, got an Order from two Justices to remove him thither; and upon a Certiorari to remove that Order into B. R. the Question was, whether after an Adjudication upon an Appeal, Ricelip is estopped to say, that is not the last Place of his legal Settlement, and adjudged they are, for if Ricelip had not been the last Place of his Settlement, they could not have sent him there, but he would have been sent back to Harrow, who was first possessed of him, so that this is in Effect but the same Question again, which hath been already determined; and there must be an End put to it: If a Man be adjudged by two Justices to be the Father of a Bastard Child, he is for ever concluded to say the contrary so long as that Order stands in Force, and 'tis an Estoppel to all Men to say the contrary, but any Man may say he is the Father.

2 Salk. 524.
5 Mod. 416.
Order confirmed upon an Appeal is conclusive.
* *Antea* 15.
S. P.

The Queen versus Corbett.

(19.) **T**HE Justices made an Order, that T. S. should pay E. G. so much Money for Labour and Work done, but did not set forth, that E. G. was Servant to the said T. S. and for that Reason it was quashed, for the Justices have only an Authority to Order Payment of Wages to Servants in * Husbandry; but by this Order it might be for Labour and Work done as a Carpenter or Mason in Building.

Mod. Cases 91.
Justices have Power to make an Order for Wages, but not for work done.
* Jones 47.

The Queen versus London.

(20.) **A**N Order recited, that two Men (naming them) were retained by M^r. London, the King's Gardiner, to work in the Gardens in Hampton-Court, at so much per Diem, and that they worked so many Days there, for which so much was due, and which M^r. London was ordered to pay; this Order being removed from Hicks's-Hall into B. R. it was quashed, because the

Order to pay so much for Wages generally, shall be intended in Husbandry.

* Cap. 4.

the Justices have no Power by the Statute * 5 Eliz. to order Payment of Wages to any Labourers, other than those who are employed in Husbandry; and the Reason is, because by Vertue of that Statute the Justices may compel Men to work in Husbandry, and therefore 'tis reasonable that they should enforce the Payment of their Wages, especially since by the same Statute they have Power to settle the Wages: Et per Curiam, where an Order is made for Payment of Wages generally, it shall be intended Wages in Husbandry; but where it appears to be otherwise, as it did in this Order it self, it shall be quashed.

O U T L A R Y. See Pleas 16.

Raym. 17.
Hard. 101.
See Britton
v. Cole.

(1.) **B**y an Outlary all personal Chattels of the Person outlawed are vested in the King by Forfeiture, but real Chattels or Freehold Estates are not vested in the King till after Inquisition found.

(2.) Therefore, if the Person outlawed do either alien or make a Lease before Inquisition, the King hath lost the Pernancy of the Profits.

1 Mod. 224.
Sid. 43.

(3.) Outlary is a good Plea to an Audita querela, even upon that Judgment upon which the Party was outlawed, because the Audita querela is not to defeat the Judgment but the Execution.

(4.) But if a Writ of Error or Attaint is brought upon the Judgment on which the Party is outlawed, in such Case Outlary is no Plea, for by these the Judgment it self is to be reversed and defeated, and then the Outlary, which is but a Superfluity, falls; for the Rule is, Non admittitur exceptio ejus cujus petitur dissolutio.

Hard. 22.

(5.) An outlawed Person was sued in the Exchequer by Bill to discover his real and personal Estate for the Benefit of the King; and upon a Demurrer to the Bill, because the Defendant is not bound to accuse himself, this Demurrer was over-ruled, because the King has a Title by the Outlary, which is quasi a Judgment for him.

(6.) A Person outlawed shall never be admitted to assign Errors, till he yields himself in Execution, for he must give Obedience to the Law before he shall have the Benefit of it; and he shall not have a Writ of Error, because in such Case he will have a Sight of the Record, and if there are Errors in it, then he will appear, otherwise not: Now the Outlary is an Attainder, and therefore he ought to appear in Person, and submit himself to his Trial; for being attainted, it must be *ex gratia*, if he is admitted to assign Errors before.

(7.) Nota, At Common Law, there was no Process of Outlary, but in Cases of Felony; and therefore, as by committing Felony a Man forfeited all his Lands, Goods, and Chattels, so by an Outlary for Felony, at this Time, he forfeits the same. Co. Lit. 128.

(8.) But Process of Outlary in personal Actions is only by the Statute, in which Case the Goods and Chattels of the Person are only liable, for those were only chargeable in personal Actions, and so they are by an Outlary in those Actions, (*viz.*) they are forfeited to the King, and he shall likewise have the Perpetuity of the Profits of the Chattels real; but this seems by a Consequence only, for that the Party being *extra legem*, is thereby become incapable to take the Profits himself.

(9.) A Merchant having 500 l. Stock in the East-India Company, was outlawed before Judgment at the Suit of W. R. the King upon Inquisition and Seizure, grants this Stock to the said W. R. and that he might sue for it in his own Name, W. R. gets the Stock transferred to him, and then the Merchant reversed the Outlary, and the King granted him Restitution, *de omnibus quibus nobis non est responsum. Et per Curiam*, this shall not restore the 500 l. Stock, because the Grant was executed and vested in W. R. and as to that Matter the King was answered. 2 Lev. 49.

(10.) Case, &c. upon a Quantum meruit for Meat, Drink, &c. The Defendant pleaded an Outlary in Bar to the Action, setting forth, that as *Exigenda posita fuit, & utlagat'*, &c. & *ea ratione, &c. debita juris forma waiviata fuit & existit*; and upon Demurrer to this Plea it was insisted, that this Outlary could not be pleaded in Bar to the Action, it being an Assumpsit upon the Quantum meruit, because till the Things are valued, the Debt is uncertain, and by Consequence cannot be forfeited: It was doubted before Slade's Case, whether a Debt upon a Simple Contract could be forfeited by an Outlary; but in that Case it was adjudged a good Plea, because the Consideration created

* 3 Leon.
205.

created a Debt, tho' it was not reduced to a certain Sum. Outlary hath been held a good Plea to an Action of Trover, and even in Bar to that Action, tho' all lies in * Damages ; but in the Principal Case the Court doubted, whether debita juris forma waviata existit, was too general or not.

1 Lev. 33.

(11.) In a Special Verdict in Ejectment, the Case was, W. R. was outlawed in a personal Action, and afterwards levied a Fine, and the King seised the Lands in the Hands of the Cognissee; and per Curiam, the Seizure had been good, if it was before the Fine levied, but not after, for then the Cognissee shall hold against the King.

O Y E R. See D E E D S.

P A R D O N.

The King versus Weedon, & al'. Mich. 12 Will. III.

Difference
between a
General and
a Special
Pardon.

(1.) **A** Conviction of Barretry renders a Man infamous, and incapable of being a Witness, but a General Pardon will restore him. Et per Holt Ch. Just. The Difference between the Effects of the King's Special Pardon, and a General Pardon, is this, (viz.) wherever the Disability is Part of the Judgment by Act of Parliament, as in Conviction of Perjury upon the Statute, there the King's Pardon cannot remove that Disability, but a General Pardon may ; but where the Disability is only consequential, as upon an Attainder, and no Part of the Judgment, there the King's Pardon will take it away.

Dr. Groanvelt's Case. Hill. 8 Will. III.

(2.) **T**HE Censors of the College of Physicians in London have Power by their Charter, to fine and imprison for male Practice in Physick, and this Charter being confirmed by Act of Parliament, they accordingly did fine and imprison Dr. Groanvelt, for administering unwholsome Pills and Medicines; and in this Case it was held per Holt Ch. Just. and the Court, that the King is Creditor pœnæ, and that all Fines for Offences belong to him; and accordingly several Lords of Manors have the Fines for all Offences within their Seigniories, But 'tis from the Grants of the King, and that he may Pardon the Offence and remit the Crime, for this is a Prerogative which he cannot part withal; for as he hath the publick Revenge in his Hands, so 'tis necessary, and for his Honour, to have a Power of mitigating or remitting the exercise of it.

1 Salk. 144
200, 263, 396
All Fines for
Offences belong to the
King.

Anonymus.

(3.) **T**HE King may pardon Felony; but then by the Statute * 10 Ed. 3. he who will have the Benefit of such Pardon must within three Months after find Sureties for his Good Behaviour by Recognisance to be returned into the Chancery; if he doth not, then the Pardon is void; but this Statute is now repealed by the Statute 5 & 6 Will. 3. by which 'tis provided, that where a Pardon is pleaded by any Person for Felony, the Judge before whom 'tis pleaded, may at his Discretion remand or commit such Person to Prison, there to remain till he or she shall enter into a Recognisance, with two sufficient Sureties, for his or her being of the Good Behaviour for any Time under seven Years; and that an Infant or Feme Covert pleading a Pardon, shall find two such Securities, who shall enter into a Recognisance, as aforesaid.

* Cap. 3.
The King
may Pardon
Felony, and
he who
pleads it
must find
Security for
good Behaviour.
* Cap. 13.

(4.) If a Man commit Felony and Inquisition is taken, and then comes a General Pardon, yet the Forfeiture remains unless there are Words of Restitution. Sid. 168.

(5.) Where a Man is guilty of Simony, and afterwards there is a General Pardon for all Offences which the King can Pardon, yet the Parson so guilty may be deprived, because Simony is malum in se.

Sid. 170, 222. (6.) So if a Man marries his Sister, he cannot be pardoned a parte ante; yet he may be divorced and punished, if he cohabits with her afterwards, for the subsequent Cohabitation is a new Crime.

1 Vent. 217. (7.) Where a Man is indicted for Treason a Pardon is good, tho' it doth not mention the Indictment; but 'tis not so where the Defendant is indicted for Murder, for by the Statute 27 Ed. 3. cap. 2. the Pardon must recite the Indictment.

1 Vent. 134.
1 Lev. 26. (8.) Where a Statute Pardon contains Exceptions in the Body of the Act, he who pleads such Statute, to intitle himself to the Benefit thereof, must aver himself not to be a Per on excepted; but where the Exceptions follow in a distant Clause by Way of proviso, he needs not.

P A R L I A M E N T.

1 Mod. 242. (1.) **A** Prorogation of the Parliament is always by the King, and in this Case the Sessions must begin de novo; but an Adjournment is by each House, and the Sessions continue notwithstanding such Adjournment.

Sid. 245. (2.) An Order was made to apprehend W. R. and to take him into Custody, for arresting a Person who claimed a Privilege under a Peer, and this Arrest was six Days after a Prorogation; but upon an Habeas Corpus the Person was discharged, because the Order determined upon the Prorogation as effectually as it would have done upon a Dissolution, and so 'tis of all Things executory and imperfect, except Writs of Error or Scire Facias; but if the Person had been taken by the Serjeant at Arms before the Prorogation, and that he must be, because it might happen that the Parliament may be dissolved, and so the Party may continue in Prison for ever.

Where a (3.) If an Offence be committed criminally in Parliament, the Man may be punished after Parliament is ended; for interest reipublicæ ne maleficia maneant impunita.

(4.) If a Parliament is assembled, and several Orders made, and Writs of Error brought in the House of Peers, and several Bills agreed on and none signed, this is but a Convention, and no Parliament, or Sessions of Parliament; but every Session in which the King Signs a Bill, is a Parliament, and so every Parliament is a Session; but not e converso. Hutt. 61.
1 Roll. Rep.
29.

(5.) In the House of Peers their Privilege begins from the Teste of the Writ of Summons, and upon every Session and Prorogation their Privilege is for twenty Days before, and twenty Days after a Sessions, this being Time enough for going to and coming from any Part of England. 2 Lev. 72.

(6.) A Writ of Error returnable ad proximum Parliamentum, is ill, unless the Prorogation is to a certain Day. 1 Vent. 266.

PARTITION. *See Jointenants* 15.

P A W N.

(1.) **W**here Goods are pawned generally, without any Day of Redemption, and the Pawner dies, the Pawn is absolute and irredeemable; but if the Pawnee dies, 'tis not so. Noy 137.
1 Bull. 9.

(2.) Where Goods are pawned, redeemable at a Day certain, the Pawnee in Case of Failure of Payment at the Day, may sell them. 1 Roll. Rep.
215.

Anonymus. Pasch. 5 Will. III.

Where a
Pawn-bro-
ker may be
indicted.

(3.) **P**ER Holt Ch. Just. Where a Pawnee refuses upon Tender of the Money, to redeliver the Goods, he may be indicted, because being secretly pawned, it may be impossible to prove a Delivery for Want of Witnesses, in Case he should bring an Action of Trover for them.

Coggs *versus* Bernard. Trin. 2 Annæ.

1 Salk. 26.

(4.) **T**here is a Case reported by this Name in 1 Salk. which see, for it doth not relate to what follows: Per Holt Ch. Just. Vadium, a Pledge or Pawn, in which Case the Pawnee hath a Property in it, for the Thing is a Security to him, that he shall be repaid the Money lent on it.

(5.) Now, if the Thing pawned may be the Worse for using, as Clothes, &c. the Pawnee cannot use them; but if it will not be the Worse, as Jewels, &c. he may use them, but then it must be at Peril; for if the Pawnee is robbed, he is liable to the Pawner, because the Pawn is so far in the Nature of a Depositum, that it cannot be used but at the Peril of the Pawnee, and it was the Using that occasioned the Loss.

(6.) But if the Pawn is laid up, and the Pawnee robbed, he is not answerable.

(7.) If the Pawn is of such a Nature that the Keeping is a Charge to the Pawnee, as a Cow or an Horse, the Pawnee may Milk the one, or ride the other, and this is as a Recompence for his Keeping.

(8.) If a Creditor takes a Pawn, he is bound to restore it upon the Repayment of the Debt, but if his Care of Keeping it be exact, and the Pawn is lost, he shall be excused, for there was no Default in him.

(9.) And where the Pawn in such Case is lost, the Pawnee hath still his Remedy against the Pawner for the Money lent, for the Law requires nothing extraordinary of the Pawnee, but only that he shall take what Care he can to restore the Goods, upon Payment of the Money.

(10.) Therefore if a Pawn is lost before Tender of the Money, the Pawnee is not liable, unless there was an apparent Default

in him; but if after the Money tendered, the Pawnee will keep the Goods, and they are lost, the Pawnee shall be liable, because his Property is determined by the Tender, and he is afterwards become a wrongful Detainer; and he who keeps Goods wrongfully must answer for them at all Events at his own Peril, for his wrongful Detainer was the Occasion of the Loss.

(11.) Where a Man pawns Goods for Money lent, and afterwards a Judgment is had against the Pawner at the Suit of one of his Creditors, the Goods in the Hands of the Pawnee shall not be taken in Execution upon this Judgment until the Money is paid to the Pawnee, because he had a qualified Property in them, and the Judgment-Creditor had only an Interest. 3 Bulst. 117.

(12.) And this is agreeable to Southcote's Case, *ff.* Where a Man delivers Goods to another to keep safely, and they are afterwards stolen, he shall be answerable for them in an Action of Detinue; because, when they were delivered to him, he undertook to keep them safely, and therefore he ought to keep them so at his Peril, tho' he hath no Reward; but if he take Goods to keep them as his own, and they are afterwards stolen, he shall not be liable; the same Law if they are pawned to him, because he hath a qualified Property in them. 4 Rep. 83.

P E R J U R Y.

Buxton versus Gouch. Pasch. 5 Annæ, B. R.

(1.) **I**N this Case it was held per Curiam, that Perjury was punishable at Common Law, that if it relate to Justice, 'tis punishable by the Statute; but if it relate to a spiritual Matter in the Spiritual Court, it may be punished there. Perjury, how punishable.

(2.) That it takes its Name from perverting Justice, therefore it must be judicial; and a false Oath in a Court of Justice is more odious than elsewhere: Style 336

(3) 'Tis

(3.) 'Tis an Offence for which the Party may be indicted, either at Common Law or upon the Statute 5 Eliz. by which the Punishment is enlarged, but the Nature of the Offence is not altered by that Statute; and in many Cases an Indictment will lie at Common Law when it will not lie upon the Statute, as for Instance, a Man may be indicted at Common Law for a false Affidavit taken before a Master in Chancery, but not upon the Statute; for this is not Perjury within the Meaning of that Statute, for that must be in a Matter relating to the Proof of what was in Issue.

(4.) So where a Witness for the King swears falsely, he cannot be indicted upon the Statute; but he may at Common Law. 2 Cro. 120. Peirce's Case.

(5.) A false Oath formerly taken in the Court of Requests, in a Matter concerning Lands, was not indictable, because that Court had no Jurisdiction in such Cases.

(6.) Indictment of Perjury was, quod tacto per se sacro Evangelio falso deposuit, &c. this was adjudged ill, because it was not fully alledged, that he was sworn.

(7.) Another Indictment was held ill, because it did not alledge that the Defendant voluntarie deposuit; and * another was likewise adjudged naught, because the Oath did not relate to the Point in Issue.

(8.) Where the Plaintiff loses his Action by a false and perjured Witness produced on the Part of the Defendant, in such Case he (the Plaintiff) cannot have an Action against that Witness, till he is indicted and convicted, unless it was such a Perjury, or in such a Court, that an Indictment would not lie for it.

PIDGEONS. See Nufance 3.

Pleas not certain, and wanting full Defence.

Hole *versus* Burgoigne. Pasch. 6 Will. III.

(1.) **D**EBT for 10 l. shewing, that in Consideration he had paid the Defendant the Rent due to him, (viz.) 5 l. he (the Defendant) by his Deed did covenant to save him (the Plaintiff) harmless, against W. R. who claimed the Lands, and then sets forth, that W. R. did implead him * inter alia, in the Court of Exchequer, in an Action of Debt to recover this 5 l. and upon a Demurrer to this Declaration, it was held ill, because the inter alia implacitavit, was too general.

Plea *inter alia*, not good.

* *Postea* Rent 1 S. P.

(2.) Want of Defence is only Matter of Form, and aided up on a General Demurrer.

Want of Defence is only Form.

(3.) The Defendant venit & defend' vim & injuriam quando, &c. and impared Specially, with salvis omnibus advantagiis & exceptionibus; it hath been held, that after this he cannot * plead Privilege, because that would be to oust the Court after a full Defence; but in Hardres 'tis held otherwise, because a claim of Privilege doth not oust the Court of Jurisdiction.

* Sid. 318.

* Hard. 565.

Bringloe *versus* Morrison. Hill. 27 Car. II. B. R.

(4.) **I**N Trespass, for Taking his Horse and riding him immoderately; the Defendant pleaded, that he took the Horse by Licence, and gave no Answer to the Immoderate Riding, yet adjudged good, for the Gift of the Action is the Taking, and the immoderate Riding is only an Aggravation of the Trespass.

Plea not Answering the Declaration, but only Part of it, yet good.

Sheppard

Sheppard *versus* Taylor. Pasch. 9 Will. III.

How a Judgment in an Inferior Court-Baron is to be pleaded.

(5.) **I**N Replevin for six Dishes; the Defendant justified under a Judgment in a Court-Baron, and a *Levari facias* awarded thereon, by Vertue whereof he took the Dishes; and upon a Demurrer to this Plea it was adjudged ill; because an Execution upon a Judgment in a Court-Baron ought not to be by *Levari facias*, but by *Distringas*, unless there is a special Custom for that Purpose; besides, the Plaintiff should not have begun with Judgment, but with the Plaint enter'd, and taliter processum fuit superinde, that there was a Judgment.

Hallett *versus* Burch. Pasch. 9 Will. III. B. R.

* 1 Salk. 394.
* 2 Salk. 580.

(6.) **T**HIS Case is reported in * 1 Salk. by the Name of Holler v. Bush, and in * 2 Salk. by the Name of Hallett v. Burt; but the Case was thus.

Where the Plea amounts to the General Issue.

A. Trespass for taking his Cows, &c. The Defendant pleads and sets forth a Right by Prescription in the Bishop of Salisbury, to grant Replevins in such a Manor, and that the Plaintiff cepit & imparcavit three Cows of another, and that he (the Defendant) by Vertue of a Replevin, as Steward, &c. took and drove them away, and traversed that he was guilty aliter vel alio modo; and upon Demurrer to this Plea it was objected, that it amounts to no more than the General Issue; for the Effect of it is, that those were the Cows of another Person, and that the Plaintiff took and impounded them: Now by the Impounding the Plaintiff had neither Title or Possession, and if so, he had no * Colour to bring an Action of Trespass for taking them out of the Pound, for in such Case Trespass will not lie, but *parco fracto*. Et per Curiam, This Plea amounts to no more than the General Issue, wherever the Defendant's Plea leaveth a Cause of Action in the Plaintiff either express or implied, but confesseth and avoideth it, the Plea is good, and this Confession and Avoidance is Colour, without which the Plea would amount but to the General Issue: Now in the Principal Case the Defendant hath set forth in his Plea, that these were not the Plaintiff's Cows, but yet, that he took them and imparcavit only, whereby they became in *Custodia Legis*, and therefore there was no Colour for him to bring an Action of Trespass for taking them out; but if the Defendant had pleaded cepit & detinuit, instead of imparcavit, the Plea might have been good.

* 3 Cro. 329.

Hatton versus Morfe. 1 Annæ B. R.

(7.) **T**here is a short Note of this Case in 1 Salk. but the Case was thus. *ſ.* In Assumpsit, &c. The Defendant pleaded, that true it is, he did promise, but that ante diem impetracionis Billæ, he paid the Money; and upon a Demurrer to this Plea it was objected, that it amounted to the General Issue. But per Holt Ch. Just. This doth not amount to the General Issue; for tho' Payment may be given in Evidence upon Non Assumpsit pleaded, yet it was long before that obtained; 'tis like giving Colour, for he says, there was a Promise, but that he performed it: Now there are many Things which may be given in Evidence upon the general Issue, and yet those Things may be pleaded Specially; as for Instance, In an Action of Debt the Defendant may plead a Release, or he may give it in Evidence upon nil debet pleaded, so in Debt for Rent upon a Demise, the Defendant may plead an Entry and Evidon, before any Rent became due, or he may give it in Evidence upon nil debet.

1 Salk. 394.
Where a
Plea doth
not amount
to the Gene-
ral Issue.

(8.) There are two Sorts of Colour, the one is express, the other implied. Of giving Colour.

(9.) Express, as in Trespass Quare clausum fregit, the Defendant in Pleading makes a Title under W. R. setting forth, that the Plaintiff claims under a Feoffment from the said W. R. by which nothing passed, but that he entered by Colour thereof: Now here the Defendant gave Colour of Action to the Plaintiff, because by the Feoffment he was Tenant at Will, and enter'd, and by Virtue of his Possession he may maintain an Action against every one, but not against him who hath a Right; so likewise in Trespass Quare clausum fregit, if the Defendant pleads, that the Plaintiff was seised, &c. and made a Lease to him for Years, there is no Occasion to give express Colour, because the Defendant allows, that the Plaintiff hath the Reversion, which is Colour enough.

Horne versus Lewin. Hill. 12 Will. III.

(10.) **I**N Replevin, the Defendant avowed the Distress taken for Rent Arrear; the Plaintiff replied, De injuria sua propria, absque hoc that any Rent was in Arrear; and upon a Special Demurrer to this Replication, because it amounted to no more than the General Issue, it was adjudged, that this was not a proper Inducement to the Traverse, as if in Trespass the De-

2 Salk. 537.
Where it a-
mounts to
no more than
the General
Issue.

N n

fendant

* Raft. Ent.
557, 558.
* 1 Koll.
Rep. 46.

defendant should plead, *De injuria sua propria, absque hoc quod est culpabilis*, so that in the Principal Case, the Plaintiff should have replied, *Reins in aretro*, and conclude to the Countrey, that had been the proper Issue, for it is a Negative to what was before affirmed. So * *De injuria sua propria, absque hoc* that there was such a Prescription, is ill, and * *De injuria sua propria, absque hoc* that he is a Bailiff, is ill; therefore the natural and proper Replication to this Avowry, had been *nihil in aretro*; 'tis quasi the General Issue, so that this Replication of Special Matter (*viz.*) *De injuria sua propria*, amounts only to the General Issue, and no other Evidence can be given, but what might as well have been given upon the proper Issue; besides, this Circumlocution must be ill, because it prolongs the Cause by enforcing the Avowant to an unnecessary Resjoinder; and tho' 'tis only Matter of Form, because it doth not alter the Evidence, yet upon a Special Demurrer, and shewing it for Cause, 'tis naught.

West versus West. Pasch. 12 Will. III.

Where the General Issue is pleaded and not entered within four Days, the Defendant may waive it, and plead specially.

(11.) **I**N an Action on the Case for a False Return, the Practice was agreed to be, that if one pleads the General Issue, and 'tis not enter'd, he may within four Days of the Term waive it, and plead Specially, and if Sunday happen to be the last of the four Days, then Monday shall be allowed; and so in Case of a Plea in Abatement, and that at any Time afterwards he may waive the Special Matter and plead the General Issue, unless there is a Rule to plead as he will stand by it.

2 Lut. 1178.
How a Release is to be pleaded.

(12.) Where the Plaintiff releases after the Action brought, the Defendant ought not to plead *Actio non*, &c. but *actionem predictam ulterius habere non debet*, and he ought to plead it either as a Release made *pendenti brevi*, or *puis darrein Continuance*; and so it is of any Matter which happens either to abate the Writ, or to bar the Action after the Writ brought.

2 Lut. 1181.
Of Justification under an Act of Parliament.

(13.) Where by an Act of Parliament a Man has leave to justify in general, that he acted by Vertue of such a Statute, according to the Tenor of the Act, he need not alledge particular Circumstances; but if he doth, and without taking Notice of the Act, 'tis a Waiver thereof, and his Plea must be taken as at Common Law.

2 Lut. 1230.
Plea that he was seised, but doth not say of what Estate, not good.

(14.) In Replevin, for taking in Overfield, &c. the Defendant pleads, that he was seised of three Acres of Land in Overfield, but doth not say in Fee, or of what Estate he was seised; and upon a General Demurrer, the Plea was adjudged ill for that

that Cause, * but to a Plea in Bar of an Action of Trespass it ^{* 2 Lut. 1313.} was otherwise adjudged.

(15.) Trespass for Breaking thirty Perch of Hedge and thirty Perch of Ditch; the Defendant prescribes for a Way, and that ipse aperuit convenientem & necessariam Viam in the Place where, &c. for Carriages, &c. and upon a Demurrer to this Plea it was adjudged ill, because he might have laid out a convenient Way without Breaking thirty Perch of Hedge. ^{2 Lut. 1350. Justification for a Way not well pleaded.}

(16.) In Trespass for Breaking his House and Close at D. the Defendant pleads, that the House and Close aforesaid was a Messuage, called Raine's Dwelling-house, and twenty Acres of Land, called Raine's Close, which said Messuage and twenty Acres of Land, was solum ipsius proprium per quod, &c. Et hoc paratus est verificare, the Plaintiff replies, that they were liberum tenementum ipsius the Plaintiff, and that the Defendant entered de injuria sua propria, and traversed, that they were the Freehold of the Defendant, & hoc paratus est verificare; it was held, that this Replication was not in Nature of a new Assignment, because that is always of another Place, but here the Place was still the same, and therefore the Bar must be taken as a real and not a common Bar, and consequently the Replication ought not to conclude with a Traverse, but should have put the Matter in Issue, (viz.) that it was his Freehold, and not the Defendant's Freehold, and so concluded to the Country. ^{2 Lut. 1402. Where it must conclude to the Country.}

(17.) In Covenant, the Breach assigned was, Non-payment of Rent and not Repairing, the Defendant pleaded an Outlary in Bar to the Action: Et per Curiam, he might have pleaded it in Bar to the Rent arrear, but not to the Repairs, because the Damages for not repairing were not forfeited by the Outlary, and by Consequence the Plea being in Bar, and not being good as to Part, must be ill in the Whole; but if the Defendant had pleaded this Outlary in Abatement, as he might have done before Impar lance, and this to the whole Writ, it had been good, but 'tis not so in Bar. ^{1 Lut. 513. Where an Outlary pleaded in Bar is not good.}

Poor Prisoners. See Statute 6.

P O W E R S. *See Common* Recovery 2.

Powers are
appendant or
collateral.

(1.) **P**Owers are either appendant or collateral, the one is where the Testator devises to W. R. for Life, with a Power to make a Jointure, &c. the other is where he devises to his Executor to sell, &c. in the first Case the Power is annexed to the Estate, and derived out of it, in the other Case 'tis collateral to it.

2 Lev. 58.
King v. Mel-
lin. Power,
where de-
stroyed.

(2.) AS for Instance, a Devise to W. R. in Tail, Remainder over, with a Power given to him to make a Jointure to a second Wife, &c. The Tenant in Tail, in the Life-time of his first Wife, suffered a Common Recovery to the Use of himself and his Heirs, then his Wife died, and he married a second Wife, and covenanted to stand seised to the Use of himself and his Wife, for their Lives, &c. adjudged, that this Power, when created, was to be executed out of the Estate-tail, which was now destroyed by suffering the Recovery, and by Consequence the Power to make a Jointure was destroyed.

Sid. 107.
Of Powers to
make Leases.

(3.) Power was given by a Marriage-Settlement to a Jointress to make Leases for twenty-one Years in Possession; the Husband died, and she married again, and then the second Husband and Wife made a Lease, &c. in Possession, but some of the Lands were in Lease before; adjudged, that the Lease was void as to those Lands.

Yel 222.

(4.) If such Power had been to make Leases generally, it shall be intended Leases in Possession.

Ch. Rep. 18.
Power not
well pur-
sued.

(5.) The Lady Antrim being a single Woman, settled her Estate for Life, Remainder to her in Tail, with a Power to make Leases (being sole) for three Lives, &c. Afterwards she married, and then she and her Husband made a Lease, &c. for Payment of Debts: Et per Curiam, this is void, being not pursuant to the Power, for the Lease of the Husband and Wife is the Lease of the Husband, and the Difference is between a naked Power, and a Power which arises from an Interest; for if a Woman hath only a naked or bare Power, as by a Will to sell Lands, she may sell, tho' she marry, because this is not a Power created out of

any Interest; but where a Power is reserved upon a Settlement, the must execute it pursuant to that Power when it was at first reserved.

(6.) In the following Case there seems to be a contrary Resolution: *St.* The Father being seized of Lands in Fee, settled the same to the Use of himself for Life, Remainder to his eldest Son in Tail, with a Power to make Leases, or by his Last Will under Hand and Seal, to charge it with 500 l. afterwards, by his Will in Writing, but not sealed, he charged it with 500 l. for his younger Children, who, upon a Bill exhibited against the Heir, had a Decree for the Money, tho' it was objected, that this Settlement was wholly voluntary: But per Curiam, the Power is well executed, for the substantial Part of it is to do the Thing; and the Neglect of a Circumstance shall not avoid it in a Court of Equity, and the rather, because such Powers are not like Conditions, strictly to be expounded, but favourably to be construed for the Benefit of the Children; and yet a Purchaser might defend himself against such a Power not well executed, especially if he had no Notice of it at the Time of the Purchase made.

Ch. Rep. 263.
Smith v.
Aston.

(7.) Adjudged, that where the Testator gives another a Power to sell Lands, he may sell his Inheritance, because he gives the same Power he had himself, and in such Case the Purchaser shall be entitled by the Will.

2 Rep. 53.
Power to sell
Lands.

(8.) But there is a Difference where Lands are devised to Executors to sell, and where the Devise is, that his Lands shall be sold by his Executors; for in the first Case an Interest passes to the Executor, because the Lands are expressly devised to him; but in the other Case they have only an Authority to sell, and if one * dies, the other cannot make a Title.

Goldf. 2.
Dyer 219.
Moor 61.
1 And. 145.

* 1 And. 145.

Norris *versus* Trist.

(9) **I**N Escamēt, the Case was: *St.* A Feoffment was made to three, Habendum to two for their Lives, Remainder to the third Person for his Life, and a Letter of Attorney to give Livery and Seisin to two, but the Attorney made Livery to all three; it was objected, that the Power was not well executed, and therefore no Livery was made, because the Power was not pursued: Sed per Curiam, 'tis true, that the former Opinions have been, that Powers must be exactly pursued, but yet * Endorsing Livery and Seisin was always favourably expounded to support the Conveyance, therefore this Livery is good for the Lives of

2 Mod. 78.
Power good,
tho' not
strictly pur-
sued.

* Sid. 428.

of

of two, and being made secundum formam Chartæ, the Remainder shall be good for the third Person.

P R E S C R I P T I O N.

Grot. lib. 2. cap. 5.
What makes a Prescription.

(1.) **T**IME of it self can never be the efficient Cause of any Thing, for nothing is or can be done by Time, tho' every Thing is done in Time, therefore by Consequence it is not the Length of Time that begets the Right of Prescription, but it is a Presumption in Law, that a Possession cannot continue so long quiet and not interrupted, if it was against Right, or injurious to another.

1 Vent. 264.
Prescription, that Occupiers have repaired Fences, good, without shewing any Title in them.

(2.) The Plaintiff declared, that the Occupiers of the adjoining Field have, Time out of Mind, repaired the Fences, which being out of Repair, his (the Plaintiff's) Beasts escaped out of his own Ground and fell into a Pit; this is good, without shewing any Estate in the Occupiers, but it had not been so if the Defendant himself had prescribed.

2 Lev. 164.
But a Custom for Farmers of such a Farm to find Cakes, &c. not good.

(3.) And yet a Custom, that the Farmers of such a Farm have always found Cakes and Ale to the Value of 8 s. or thereabouts, at Perambulations, was held naught, because 'tis no more than a Prescription in Occupiers, which is not good in Matter to charge the Land.

2 Lut. 1546.
Prescription for Inhabitants, &c. to repair a Way.

(4.) Prescription by the Inhabitants of a Parish to dig Gravel in such a Pit, which is the Soil of W. R. it was doubted, whether this was good, or not, tho' it was to repair the Highway; but yet Inhabitants may prescribe for a Way, and by Consequence for necessary Materials to repair it, and so they may for a Watering-place; and so they may to take Rushes in the Land of another to strew the Church; and so may Masters of Ships to dig Ballast in the Port of Lynn, for this is for the publick Good.

3 Cro. 664.
March 16.
3 Lev. 160.

2 Vent. 186.
Prescription in Occupiers, &c. to have a Way from one House to another, not good.

(5.) In Trespass, the Defendant pleads, that within the Parish of H. all Occupiers of such a Close habent, & habere consueverunt, a certain Way leading over the Plaintiff's Close to the Defendant's House, this was held ill, for 'tis not like a Prescription to a Way to the Church or Market, which are necessary, & pro bono publico.

Hill *versus* Ellard. Mich. 16 Car. II. B. R.

(6.) **I**N Replevin, for taking a Cow, the Defendant justified under a Prescription to have Common in the Place where, &c. for four Cows and half a Cow; and upon a Demurrer to this Plea it was adjudged to be very absurd to prescribe for Common for half a Cow; but having prescribed to have Common for four Cows, that was sufficient to justify for one Cow.

Prescription for Common for four Cows, is good for one Cow.

(7.) The Defendant pleads, that he was seised, &c. and that he, and all those whose Estate he had, &c. have used to have Pot-
Water, &c. Adjudged ill, because a Prescription cannot be annuered to an Estate for Years, and he doth not say that he was seised in Fee.

4 Mod. 318. Prescription cannot be by one who hath an Estate for Years.

Postea 9. S.P.

(8.) The Inhabitants of E. joined in a Claim of Common by Prescription, &c. and it was held, that Tenants in Ancient Demesne may join in such a Claim, because the King cannot claim for them; but in the Principal Case, all the Copyholders to one Lord ought to claim in and by that Lord, and that Lord ought to prescribe for him and his Tenants (i. e.) for his Copyhold Tenants, because he hath the Freehold himself; but the Lord cannot claim or prescribe for the Freeholders, for they have a Freehold in themselves; besides Inhabitants can never prescribe for Common, or other Profit appender, but only for Matters of Easement.

Jones 176. Tenants in Ancient Demesne may join in a Prescription for Common.

(9.) Prescriptions are properly Personal, and therefore are always alledged in the Person of him who prescribes, (viz.) that he and all those whose Estate he hath, &c. therefore a Bishop or Parson may prescribe quod ipse & prædecessores sui, and all they whose Estate, &c. for there is a perpetual Estate, and a perpetual Succession, and the Successor hath the very same Estate which his Predecessor had, for that continues, tho' the Person alters, like the Case of the Ancestor and the Heir: but a Tenant for Life or * Years cannot say quorum Statum ipse habet, because he hath a new and distinct Estate from his Predecessor, and so 'tis of all Tenants at Will, and Inhabitants, &c. therefore they must refer to the Place by Way of Custom.

Prescriptions are always alledged in the Person.

* *Antea* 7.

PRESENTATION.

Sid. 95.
Of a Presen-
tation pend-
ing a *Quare*
Impedit.

2 Cro. 93.
* *Ne admit-
tas*.

(1.) If the Defendant, or any Stranger, presents a Clerk pending a *Quare Impedit*, and afterwards the Plaintiff obtains a Verdict and Judgment, he cannot by Vertue of that Judgment remove him who was thus presented; but he may bring a Scire facias against him, to shew Cause quare executionem non habet; and then if it be found, that he had no Title he shall be removed. Now the Way to prevent such a Presentation is to take out a * *ne admittas* to the Bishop, and then the Writ *Quare incumbravit* lies against such an Incumbent, who by Vertue thereof shall be removed, and put to his *Quare Impedit*, let his Title be what it will.

1 Mod. 130.
2 Mod. 183.
How the
Plaintiff
must declare
on a Presen-
tation.

(2.) Where a Man gets the Fee to his Presentation, which is his Title, he must in his Declaration alledge the Presentation to be *tempore pacis*, for otherwise it may be intended to be *tempore belli*, and then 'tis no Title; but where the bare Presentation is not his Title, but only in Pursuance of a former Right, in such Case he may alledge it generally.

(3.) As for Instance, where a Man declares, that W. R. was seised of the Manor of D. as of Fee, to which an Advowson was appendant, and that being so seised he presented W. W. and afterwards granted the next Avoidance to the Plaintiff; this is good, for here the Plaintiff shews a precedent Right, and doth not make the Presentation itself his Title.

Holt versus Bishop of Winton.

3 Lev. 47.
Where the
Incumbent is
likewise Pa-
tron and
dies, his
Heir, and not
his Executor,
shall present.

(4.) In a *Quare Impedit*, the Case was, ff. The Incumbent being seised of the Advowson of the same Church in Fee, died, and the Question was, who should present, either his Heir at Law or his Executor; and upon a Demurrer, it was objected against the Right of the Heir at Law, that he could not present, because the Advowson did not descend to him till after the Death of his Ancestor, in which very Instant of Time the Church was void; and therefore the Avoidance was severed from the Inheritance, and vested in the Executor. Sed per Curiam, the Heir shall present, because at the same Time that the Avoidance vested in the Executor the Inheritance descended to the Heir, and

and where two Titles concur in an Instant of Time, the Elder shall be preferred.

P R I V I L E G E.

(1.) **I**n the Court of Exchequer there are three Sorts of Persons who are privileged, (i. e.) Debtors to the King, Officers and Accountants; against the first of these Persons any Man who has a Privilege in another Court, as an Officer or Attorney thereof, shall have his Privilege, for the Privilege of a Person as Debtor is but a general Privilege; it was at first only for the Benefit of the King, which is now refused, and a Quo minus is no more than a Common Action in this Court.

Hard. 365,
507.
Of Privilege
of the Court
of Exche-
quer.

(2.) An Accomptant entered upon his Accompt, and adjudged, that he shall have his Privilege till the Accompt is over, because his Attendance here de die in diem is necessary to pass his Accompt, and the King has an Interest in his Attendance; but when the Accompt is finished, and become a Debt by being reduced to a Certainty, he then hath no other Privilege than a General Debtor.

Ibidem.

(3.) If an Officer commence a Suit here, no Privilege in any other Court shall prevail against it, because his Attendance is requisite here, and his Privilege is first attached in this Court.

(4.) Sir Edm. Sawyer being presented in Eyre, delivered in a Superseas for his Privilege, as one of the Auditors of the Exchequer; to which it was objected, that he ought to plead his Privilege, if he had any; for the Privileges of the Exchequer are all in the Red Book, and the Order is, that if an Officer of the Exchequer is impleaded elsewhere, that a Baron coming with that Book, and shewing the Order, and also avowing the Person to be an Officer of that Court, the Privilege shall be allowed without any Plea; but where the Book is not produced the Privilege must be pleaded; but if the Defendant in this Case had pleaded his Privilege, it was a Question, whether it would have been allowed, because he was an Auditor of the New Revenues, and none of the Antient Auditors.

Jones. 233.

1 Mod. 298.
Privilege of
Attorney of
Common
Pleas.

(5.) An Attorney or Philazer of the Common Pleas, if sued in B. R. may plead his Privilege, because they owe a personal Attendance to that Court; but a Serjeant at Law being sued in B. R. he cannot plead his Privilege of C. B. for he may sign Pleas, be assigned of Counsel, and Practice in other Courts in Westminster-Hall, but if he is sued in any Inferior Court, he shall have his Privilege.

Ibidem.

(6.) Where an Officer of the Court of C. B. is sued jointly with a Stranger, who hath no Privilege, in such Case, the Officer so sued shall not have his Privilege.

Kirkham *versus* Wheely. Trin. 7 Will. III.
B. R.

2 Salk. 543.
Where a
Plea in the
Negative,
and without
full Defence,
is good.

(7.) **I**n an Action Qui tam, &c. the Defendant in propria persona sua dicit, that he is an Attorney of the Common Pleas, and that the Attornies of that Court have Time out of Mind not been sueable elsewhere; and upon a Demurrer to this Plea, it was objected, that it was pleaded in the Negative, (viz. That Attornies of the Court of Common Pleas, &c. have not been sueable elsewhere, and no Jurisdiction is given or shewed to any other Court: Another Objection was, that the Defendant hath not made a full Defence, for he only said in propria sua dicit, when it should be venit & dicit; and the last Objection was, because the King is made a Party in this Action, and he hath Privilege to sue where he pleases. Sed per Curiam, this Plea in the Negative is well enough, because the Privilege, if traversed, is not triable by the Countrey, for 'tis Matter of Law, and there is a Jurisdiction given to the Court; as to the second Objection, venit is no Part of the Plea, and therefore it may be omitted; but the Plea begins by the Word dicit, and thereof that alone is sufficient: And as to the third Objection, 'tis true, the King is entituled to bring his Action where he pleases, but the Informer is not; for if he die there is an End of the Suit, and the King is not entituled till Recovery had; and Prosecutors Qui tam, &c. are look'd upon as Informers.

Baker *versus* Swindon. Mich. 10 Will. III. C. B.

(8.) **I**N this Case it was held per Holt Ch. Just. that Privilege is either of Court or of Process, as in the Court of Common Pleas, every Person who belongs to that Court, as Attornies, their Clerks, &c. shall have the Privilege of being sued there, and not elsewhere; and this is the Privilege of Court: But none shall be allowed the Privilege of Process, but those who are Officers of the Court, and are supposed to be always attending there.

Two Sorts of Privilege, (viz.) of Court and of Process. *Postea* 10. S. P.

Edwards *versus* Copland. Pasch. 6 Will. III. B. R.

(9.) **I**N an Action on the Case, the Defendant pleaded to the Jurisdiction of the Court, that he is an Attorney of the Court of Common Pleas, and ought to be sued there, &c. the Plaintiff replied, that he (the Defendant) is not an Attorney of the Court of Common Pleas, and concludes to the Country, and upon Demurrer to this Replication, the Rule was for the Defendant to answer over, for 'tis a good Traverse and Conclusion; and in this Case it was held, that the Defendant might plead this Privilege per Attornatum.

Where Privilege may be pleaded per Attornatum.

Willis *versus* Battershell. Trin. 6 Will. III. B. R.

(10.) **I**N Assault and Battery the Defendant pleaded to the Jurisdiction of the Court, that he is one of the Clerks of J. Cook, Prothonotary of the Court of Common Pleas, quodq; ipse & omnes hujusmodi Clerici de eadem Curia, ought not to be impleaded but in that Court; and upon a Demurrer to this Plea the Plaintiff had Judgment, because the Defendant did not allege himself to be a Clerk of the Common Pleas to whom this Privilege (as he pretended) did belong, but only that he was Clerk to a Prothonotary of that Court, and B. R. will not intend the Privilege to be other than as he hath pleaded it.

Privilege not well pleaded.

Ogle *versus* Norcliffe. Pasch. 2 Annæ.

(11.) **T**here are two Sorts of Privilege in the Court of Common Pleas: Per Holt Ch. Just. the one is of the Officers of that Court, to be sued there by Bill, and the other is of their Clerks, to be sued there, and not elsewhere by Original.

Two Sorts of Privilege. *Antea* 7. S. P.

Elderton's Case. Mich. 2 Annæ, B. R.

Mod. Cases
73.
Privilege of
a King's Pa-
lace.
Antea Com-
mitment 1.
S. C.

(12.) **H**E was committed by the Board of Green-cloth, for executing a Fieri facias in White-hall; and upon an Habeas Corpus it was argued to be a lawful Execution of the Writ, and not prejudicial to the Privilege of the Palace, and that admitting it was a Breach of the Peace, yet the Board of Green-cloth had no Power to commit this Person, because he was not the Queen's Servant, and that Court hath only a Power over the Queen's Family, for the Government and ordering her menial Servants, and that the Privilege of White-hall was created by the Statute 28 H. 8. cap. 12.

Northy Attorney-General, argued to the contrary: *N.* That there was a standing Commission of the Peace for the Verge and Palace, and that the Officers of the Green-cloth are always Commissioners, that the Statute 28 H. 8. did not create the Privileges of this Palace, but ascertained the Boundaries thereof, for the Queen may declare any House to be a Royal Palace, and this without any Act of Parliament; that such Declaration is made under the Great Seal, after which 'tis a Palace, tho' the Queen doth not reside there; for the Queen did not reside at the Tower, and yet Burdett had his Hand cut off for murdering his Keeper there, and was afterwards executed.

Per Powell Just. the Privileges of the Palace are by Common Law, and that in respect of the Queen's Presence; and he said, that the Breaking into the Exchequer had been held Burglary, tho' none of the Queen's Servants were there.

But Holt Ch. Just. denied it, and as to Burdett's Case, he said the same Fact cannot be a Misdemeanor and a Murder too, for the one will extinguish the other; 'tis true, his Hand was cut off, but it was without any Authority, for there was no Judgment for it; he said, that he had searched the Roll, which was Mich.

See Stow Chr. 15 & 16 Eliz. Rot. 2. Burdett and Muskett's Case, and there was no Judgment for cutting off his Hand.

He held, that where there was a total Absence, as in the principal Case, where the Queen was neither present in Person nor by her Domesticks, or any of her Family, the Place was not privileged; otherwise where there was only a short and personal Absence: The Queen now resides at Windsor, and suppose a Murder should be committed in White-hall, shall that be tried before the Lord High Steward, &c. certainly not.

Brown

Brown *versus* Burlace. 9 Will. III. B. R.

(13.) **T**HE Defendant was arrested in the Temple, and upon a Motion to set it aside, it was insisted for him, that the Temple is * privileged from Arrests by the King's Grant.

Antea Arrest
1. S.C.
* Dugdale
317, 320.
Stow Chron.

But per Holt Ch. Just. if the King hath made any such Grant, 'tis void in Law, they having no Court of Justice within themselves there; 'tis true, the Temple is extraparochial, and not within any Parish, nor within the City, so as to come within the Customs of the City, but 'tis within the County of the City, but the White-fryars is within the Jurisdiction of the City.

Yet the Court inclined not to countenance Arrests in the Temple, especially in Term-time, but would not set aside this Arrest, so the Defendant was held to Special Bail.

Ruch *versus* Weddall.

(14.) **D**E B C upon Bond in B. R. brought against an Attorney of the C. B. the Defendant pleaded, that he is an Attorney of C. B. and that there is a Custom in that Court, that an Attorney shall not be compelled to answer, unless per Billam, and so pleads his Privilege to be sued per Billam, and not by Original; the Plaintiff replied, that for five Years past, before the Original filed, the Defendant had no Clients, but had withdrawn himself from the Practice and Office of an Attorney; and upon a Demurrer to this Replication, first it was objected, that the Plea was ill, because the Defendant had not set forth, that he had any Clients, or that he prosecuted or defended any Suits, that being the Reason why an Attorney should have Privilege: Sed per Curiam, as long as an Attorney is so upon Record, he shall have Privilege; then it was objected, that this Custom was alledged in Fieri, for it was, that an Attorney should not be compelled to answer, unless per Billam, he should have gone on, Nec a tempore ejus contrarium memoria hominum non existit compelli consuevit, and this would have been an Allegation of an Usage in Fact, which is essential to make a Custom, and therefore must be positively set forth and alledged in Pleading; but adjudged, that the Court may take Notice of the Privileges of Attornies, therefore a Custom in such Cases need not be so strictly alledged.

2 Lutw.
Privilege of
Attorney
well pleaded:

P R O-

P R O C E S S.

(1.) **A**T Common Law, where the King was Plaintiff in any Action, whether for Debt or Damages, he had Execution against the Defendant, both for Body, Lands and Goods, but by Magna Charta, cap. 9. he was not to take out Execution against the Lands, if the Defendant had sufficient Goods to answer the Debt or Damages.

(2.) But where a Subject brought an Action against another Subject, either for a Debt or Damages, his Execution was only against the Goods and Chattels of the Defendant, either by Fieri facias or by Levari facias, he could not have Execution against his Lands, till the Statute of Westm. 2. by which cum Debitum recuperatum est an Elegit is given, and that was only for a Moiety; and by the Statutes 13 Ed. 1. de mercatoribus, by the 27 Ed. 3. and by the 23 H. 8. an Extent was given, but no Capias lay till the Statute of Marlbridge, cap. 23. and Westm. 2. cap. 11. and 25 Ed. 3. cap. 17. by which Process of Capias is given in Accompt and also in Debt, whereas before those Statutes the Process was Summons, Attachment, and Distress infinite.

(3.) The Process of Capias on a Judgment in Debt is not given by the express Words of any Statute, but arises by Consequence of Law (i. e.) the Statute giving a Capias in mesne Process, a Capias in Consequence lies on the Judgment, because 'tis a Rule of the Common Law, that wherever a Capias lies in Process before Judgment, it will lie in Execution upon the Judgment it self.

(4.) But if there is a Judgment in C. B. against the Bail, upon a Scire facias brought against them, no Capias lies on such Judgment; otherwise if the Judgment was given against them in Debt, for then 'tis within the Statute.

(5.) But where Judgment is given as a Scire facias upon a Recognisance against the Bail in B. R. a Capias will lie, for so has been the Course of that Court.

1 Roll. 898.

(6.) There was a Judgment on a Scire facias against the Bail, and a Writ of Error brought in the Exchequer Chamber, pursuant to the Statute 3 Jac. adjudged, that in this Case no Ca-

pias lies against them, for this Matter is not to be guided by the Custom of the King's Bench, but by the Common Law, and the Bail bound their Goods and Lands by the Recognisance, and not their Persons.

PROHIBITION.

(1.) **P**rohibitions are granted either pro defectu jurisdictionis, ^{1 Vent. 274} or pro defectu triationis; as where a Man libells in the Spiritual Court for 20 s. due to him by Custom, for burying in the Church, the Defendant pleaded there was no such Custom; in this Case a Prohibition lies pro defectu triationis, for the Spiritual Courts cannot try a Custom.

(2.) A Prohibition was granted to Wood-street Compter for ^{1 Vent. 180.} refusing to admit a Plea to the Jurisdiction, which was tender'd on Oath, and before Imparance.

(3.) In a Prohibition, and upon a Motion for a Consultation, it was insisted, that it ought not to be granted without pleading or demurring to the Prohibition, for if erroneously granted, the Party could have no Remedy, either by Writ of Error or otherwise; but it was answered, that anciently in B. R. there were no Declarations or Demurrers upon Prohibitions, and therefore Consultations were granted upon Motions.

(4.) In a Prohibition to the Spiritual Court, upon a Suggestion, that they intended to try the Boundaries of a Parish; the Plaintiff declared and entituled himself by Letters Patents granted to such a Corporation, who made a Lease to him, &c. the Defendant demurred to the Declaration, for not shewing the Letters Patents and the Lease, by a proferre hic in Cur'. Sed per Curiam, no Consultation shall be granted for Want of pleading them, for they may be given in Evidence. ^{1 Roll. Rep. 332. Letters Patents may be given in Evidence.}

(5.) Where it appears upon the Face of the Libel, that the Matter is not within the Jurisdiction of the Court, nor proper for their Sentence, a Prohibition will be granted at any Time; but if the Plea of the Defendant be Matter of Spiritual Jurisdiction, and tis refused or over-ruled, no Prohibition lies, ^{1 Mod. 273. Where a Prohibition may be granted at any Time.} for

for in such Case the Party must appeal; otherwise, if 'tis a Matter of Temporal Cognisance, as a Modus, or an Agreement, &c.

Freeman *versus* Shotter.

How the Spiritual Court is to try a Thing of Temporal Nature.

(6.) **R**uled, that where a Thing incident in the Spiritual Court is of a Temporal Nature, they must try it in the same Manner in that Court, as it would have been tried at Law, otherwise a Procedendo will be granted; but if the Matter incident is of a Spiritual Nature, or of Spiritual Cognisance, they may try it according to their own Law; as for Instance, if they require two Witnesses to the Proof of a Revocation of a Will, a Prohibition will not be granted, because such Proof is required at Law; but if they require two Witnesses to prove a Release, a Prohibition will be granted.

Anonymus. Hill. 9 Will. III.

Where an Inferior Court hath no Original Jurisdiction, Prohibition will not lie after Sentence.

* Sid 166. *contra*.

(7.) **P**ER Holt Ch. Just. Where an Action is commenced in an Inferior Court of Law, which hath no Jurisdiction of the Cause, in such Case a Prohibition will not lie after * Sentence; but 'tis otherwise, if the Suit is commenced in the Admiralty, or in the Spiritual Court, for their Law is different from ours.

Anonymus. Hill. 13 Will. III.

Prohibition to the Spiritual Court for Words.

(8.) **L**ibel in the Spiritual Court by the Husband and Wife, for calling the Husband Cuckold: Ruled per Holt, Ch. Just. that a Prohibition shall go, because they cannot both sue in that Court for that Word.

Brown *versus* Tanner. Pasch. 2 Annæ.

Prohibition for calling the Parson Drunkard.

* Cro. Car. 207. March. 6. S. P. * 2 Roll. 296.

(9.) **L**ibel in the Spiritual Court, for Brawling in the Church-yard, and for telling the Parson, Thou art a pitiful drunken Parson, and a drunken Puppy; and Salkeld moved for a Prohibition upon the Authority of the Case between * Star and Bucknell, where for the like Words a Prohibition was granted, and so in * Haines's Case; and the Reason was, because Drunkenness is a Temporal Offence; 'tis true, the Cases before mentioned were of Drunkenness in Lay-Men, but if 'tis an Offence in a Lay-man, a fortiori it should be so in a Clergy-man; 'tis a Crime which doth not take its Nature from the Person who commits it, but from

from the Law which is offended; * 'tis true, the Canonists make every Thing which is a Sin, and forbidden by the Ten Commandments, to be a Spiritual Offence, as Læsa fides, Murder, Perjury, &c. But by the Common Law, whatever is taken Notice of and punishable by the Temporal Laws, is a Temporal Offence; and what is not punishable by the Temporal Law, but by the Spiritual Law, in such Case, that Law is a kind of Supplanting the Temporal Law, and the Offences so punishable are Spiritual Offences, as Fornication, Adultery, &c.

* *Confessio*
Apology.

Now as for Drunkenness, it was always accounted a Temporal Offence, for it was indictable at Common Law; and Alehouses were formerly appointed in the Leet, and before the * 24 of Eliz. there was scarce such a Crime in England: 'Tis true, a Parson may be deprived for Drunkenness, and so he may for * Buggery, but yet he is not punishable for that Offence in the Spiritual Court, because 'tis a Temporal Offence; afterwards a Prohibition was granted as to the Words, but not as to the Brawling in the Churchyard.

* *Cambden*
Eliz. 263.

* *Hob. 121,*
290.

2 *Roll. Hig-*
gin's Case.

296. and 12
Rep. 42.

Fuller's Case.

Anonymus.

(10.) **P**ER Ch. Just. In the Cases of Prohibitions, where they were granted upon a Motion, the antient Course was, that the Party prohibited sued out a Scire facias, Quare Consulatio non debet concedi post prohibitionem, in which Writ the Suggestion was recited, and also a Prohibition granted thereon, ad damnum of the Party.

The antient
Course of
Proceedings
on a Prohi-
bition.

Plow. Com.
472. Reg. 71.

Afterwards this Practice was altered, and the Course came to be thus, (viz.) Upon granting a Prohibition to the Plaintiff, the Court bound him in a Recognisance to prosecute an Attachment of Contempt against the Defendant, for suing in the Spiritual Court after a Prohibition granted, and then to declare upon the Prohibition; so that he was the Defendant in that Court, is now become Actor or Plaintiff in the Court above.

The Queen versus Ride. Mich. 3 Annæ B. R.

(11.) **A** Popish Recusant convict made his Wife Executrix, the Spiritual Court admitted her to proceed in proving the Will, but a Prohibition was granted, for she is disabled by the General Clause of the * Statute of Eliz. and not enabled by the proviso.

* *Cap. 4m*
Par. 22.

PROPERTY. *See* Trespass. Replevin, 4.

Sutton versus Moody.

5 Mod. 375.
2 Salk. 556.

1 Cro. 553,
545.
Jones 440.
March. 44.
Of the differ-
ent Sorts of
Property.

* 7 Rep. 17.b.

(1) **I**n this Case it was held per Holt Ch. Just. That if the Plaintiff declared in Trespass for Breaking his Close and killing centum cuniculos, 'tis good without saying suos, for he has a Property in them in Respect of his Close where they were killed; and of Things of this Nature there are three Kinds of Property, (viz.) absolute, qualified and possessory. 1. A Man hath an absolute Property in Feris natura sua mansuetis. (2.) He hath a qualified Property in Feris mansuetis; and (3.) he hath a possessory Property in Feris: Now whoever hath a possessory Property, which is also a Property ratione privilegii, there he may declare for the Thing killed or taken, without saying that it was * suum, for he had a Property by Reason of his Close in which it was, and may recover Damages, which he cannot do unless the Thing was suum. He farther held, that if a Man finds a Hare in his own Land, and in Hunting kills it on the Land of another, 'tis the Property of the Hunter, and not of the Person on whose Ground it was killed; so if he starts a Hare not on his own but another Man's Land, and hunts it into the Land of a third Person, and there kills it, the Property is still in the Hunter; but if he starts a Hare in a Forest, and hunts and kills it in another Man's Land, the Property is in the Owner of the Forest.

Evans versus Martell. Mich. 9 Will. III. B. R.

Where the
Consign-
ment of
Goods to an-
other vests
a Property.

(2) **O**NE Harvey loaded Goods on Board a Ship, and con- signed them to Evans; but by the Invoice the Goods ap- peared to be the Property of Harvey, and now in an Action brought by Evans against the Defendant Martell for these Goods, it was adjudged, that the Invoice signifies little in this Case, but that it was the Consignment of the Goods, which gave the Property, and vested it in Evans, and therefore he might maintain this Action;

but

but if they had been consigned to him upon the Accompt of Harvey, that would have altered the Case, for then he would have been only Factor to Harvey, and he must have brought the Aſſen, because the Property was then in him.

Gipps versus Woolliscott. Trin. 7 Will. III. B. R.
Rot. 301.

(3.) **T**RESPASS, &c. for that the Defendant in separali Piscaria, & in libera Piscaria sua apud D. piscavit, and did take and carry away * 500 Salmones; upon Not guilty pleaded, the Defendant was found guilty as to the Fishing in the free Fishery of the Plaintiff; and as to the several Fishery, the Jury found that the Locus in quo, &c. was Parcel of his Manor.

Trespass for taking Fish, and did not say suos, not good.
* Indictment 14.
3 Mod. 97.
Postea 4.

Et per Holt Ch. Just. a Man may have a free Fishery in his own Soil, as for Instance, he may have a River in his Manor, and another may have a Right of Fishing there with him: But because the Plaintiff in his Declaration had not alledged, that the Defendant took Salmones suos, nor ibidem cepit, therefore the Defendant had Judgment.

The Queen versus Steer.

(4.) **T**HE Defendant was indicted, for that at such a Time and Place, he illicite fished with Nets in the Pond of T. S. and so many Carps, de Bonis & Catallis of the said T. S. did take and carry away; it was objected against this Indictment that Fish in a Pond could not be called Bona & Catalla of any particular Person: Sed per Curiam, in a * close Pond the Fish may be called * Pisces suos, because they cannot swim away, and therefore the Owner of such Pond hath a Property in them ratione loci; but yet they cannot properly be called Bona & Catalla, unless they are in Trunks, and for that Reason this Indictment was held ill, but the Court would not quash it upon a Motion, but ordered the Defendant either to plead to it or to demur.

Mod. Cases 183.
Fish in a Pond may be called suos.
* 3 Mod. 97. contra.
Vide Jones 440.
March 48.
That they may be called Pisces suos.

Mallock versus Eastley.

(5.) **T**RESPASS for taking two Does ipsius querentis, in a Close called the Park; the Defendant demurred generally, for that the Plaintiff set forth in his Declaration, that they were his Does, when by Law no Man can have a Property in Deer, unless they are tame or reclaimed, tho' they are in a Park; but in the principal Case it did not appear, that they were

3 Lev. 227.
Trespass for taking two Does ipsius querentis.

in a Park, but in a Close called the Park; and for this Reason the Defendant had Judgment.

P U R C H A S E.

Where the Word *Heirs* is a Name of Purchase, and where a Word of Limitation.

(1.) **T**HE Word *Heirs* or *Issue*, when used to denote a single Person, or so as to be only *designatio personæ*, are Words of Purchase only, but when collective, they are Words of Limitation.

Where the Word *Heirs* is *designatio personæ*.

(2.) When ever those Words *Heirs* or *Issue* have Words of Limitation annexed to them, they are used only as *designatio personæ*, as where a Devise is to W. R. for Life, Remainder to his *Heirs*, and to the *Heirs Females* of their Bodies.

Where a Remainder to a Man and his *Heirs* is conveyed by Way of Use.

(3.) If a Man make a Lease for Life, Remainder to his *Heirs*, or Remainder to himself and his *Heirs*, or to himself and the *Heirs* of his Body, the Remainder is void, and his Estate is not altered; but 'tis otherwise if he convey it by Way of Use with such Limitations.

1 Mod. 159.
1 Vent. 378.
Remainder to *Heirs* Males of his Body is an Estate-tail executed.

(4.) As if he make a Feoffment to the Use of himself for Life, Remainder to the *Heirs* Males of his Body, this is an Entail executed in him, and so it is, if he covenanted to stand seised in the same Manner.

Where the Heir is in by Purchase.

(5.) Where the Father devises to his eldest Son upon Condition, in such Case the Son shall be in by Purchase, and not by Descent.

1 Mod. 226.
Where an Estate is vested by Way of Purchase, it shall afterwards go in a Course of Descent.

(6.) The Case was, the Father having two Sons, in Consideration of the Marriage of his eldest Son, covenanted to stand seised to the Use of his said eldest Son, and the *Heirs* Males of his Body, Remainder to the right *Heirs* of the Father; the eldest Son married, and had issue Edward and four Daughters, then the eldest Son died, and afterwards Edward the Grandson died without Issue; and the Question was, who had the best Title, either the second Son or the Daughters of his elder Brother; and adjudged, that the Limitation to the eldest Son, and to the *Heirs* Males of his Body, is good; and that the Estate vested

in him by Way of Purchase, tho' at Common Law a Man could not make his own right Heir take by Purchase, without departing with the whole Fee-simple, but now by Way of Use he may; and in this Case, after the Death of the Grandfather, both the Estates-tail were vested in Edward the Grandson, (viz.) As Heir Male of the Body of his Grandfather and Father; and if so, then this being a Remainder vested in him as a Purchaser, the Estate shall go on in a Course of Descent, and his Sisters shall have it.

QUARE IMPEDIT.

(1.) **T**HIS is a possessory Action, and therefore not to be maintained without a Possession, for which Reason the Plaintiff must always declare upon a Presentation made by himself or his Ancestor, or one whose Estate he hath, or by the Grantee of the next Avoidance, or by his Lessee for Life, or for Years.

This is a possessory Action, and how to declare in it.

(2.) In a Quare Impedit against the Bishop, and against A. and B. the Patron and Clerk, in which the Plaintiff declared, that W. R. was seised of a Manor to which the Advowson was appendant, and presented S. and that by Escheat the said Manor and Advowson came to the King, and that he granted them to the Plaintiff; and that S. the Incumbent being dead, it belonged to him (the Plaintiff) to present; the Bishop confesses all the Declaration, only says, that the King was seised and presented B. and traversed, that he granted the Manor and Advowson to the Plaintiff, B. the Incumbent pleads, that he is persona impersonata ex presentatione Domini Regis, and makes Title in the King; the Plaintiff replies, that B. was not presented by the King, &c. upon which B. demurs; and per Curiam, the Bishop's Plea is not good, for he can never counterplead the Title of the Plaintiff without making a Title in himself, either as Patron or by Lapse, for otherwise he hath no Interest, but only Institution; and the Plea of the Incumbent is likewise ill, for by the Common Law he could not maintain the Title of his Patron; and if the Patron was not made Defendant with him, then he (the Incumbent) might plead it in Abatement; if he was made Defendant, then he was to plead his own Title, which was sometimes found to be

Jones 5. Where the Ordinary cannot counterplead the Plaintiff's Title, without making a Title in himself.

inconvenient, because he would plead by *Cobin*; therefore by the Statute 25 Ed. 3. the Incumbent is allowed to plead the Title of his Patron; but in the principal Case, if he was presented by A. he cannot quit the Title of that Patron, and plead a Presentation and Title by another Person.

1 Roll. Rep.
62.

(3.) The very Judgment in a *Quare Impedit* is an Amotion of the Incumbent, tho' he continue still the Possession *de facto*, and if the Plaintiff be instituted upon a Writ to the Bishop, the Defendant cannot appeal, if he doth, a Prohibition lies, because in this Case the Bishop acts as the King's Minister and not as a Judge.

QUOD CUM. See Forgery 1. Indictment 6.

R E C O R D. See Statute 5.

Crockmere *versus* Wickins. Hill. 8 Will. III. B. R.

Where *Nul tiel Record* is pleaded, the Party cannot demur to it.

(1.) **A**N Action was brought in B. R. the Defendant pleaded another Action depending between them in the same Court, and for the same Cause; the Plaintiff replied, *Nul tiel Record*, &c. adjudged, that in this Case the Defendant may pray Oyer of the Record, and the Court may order that it may be inspected, and upon such Oyer craved, an Entry shall be made for the Court to examine the Record, and Judgment shall be given upon failure of the Record; the Defendant may likewise plead *Nul tiel Record*,

cord, and then also the Entry and Proceedings shall be as before mentioned; but he cannot rejoin properly quod habetur aliquod tale Recordum; neither can he demur, for the Record is perfect, and the Pleading is at an End, and therefore a Demurrer in this Case was upon a Motion ruled to be irregular, and set aside.

(2.) But if the Action had been pleaded as depending in another Court, pro eadem causa, and the Plaintiff replied Nul tiel Record, the Defendant must have rejoined quod habetur aliquod tale Recordum.

Where *habetur aliquod tale Recordum* is a good Plea. *Postea* 3. S. P. * Dyer 180.a.

Hambleton *versus* Lancashire. Trin. 2 Annæ B. R.

(3.) A Scire facias was brought against the Bail in B. R. upon a Recognisance in that Court; the Defendant pleaded in Abatement another Scire facias depending in the same Court, and upon the same Judgment: The Plaintiff replied, Nul tiel Record, & hoc paratus est verificare, prout curia consideravit, upon which there was this Entry, Et quia Curia Domine Regine nunc hic coram ipsa Domina Regina advisare vult superinspectionem & examinationem Recordi per prædict' the Parties allegat' priusquam judicium suum inde reddant, dies inde datus est partibus prædict' coram ipsa Domina Regina, &c. Usque ad, &c. de judicio inde de & super præmissis reddendo, &c. upon which there being a Default at the Day, Judgment was given against the Defendant: And now Mr. Broderick moved, that this was irregular, and that the Plaintiff ought to have said for a Rejoinder, and he argued, that this was contrary to all the Precedents, and he cited all those in the Margin. But on the other Side Mountague argued, that the Judgment was well given; and to prove it he cited Dyer 228. and * Buck's Case in B. R. which he said was a Case in Point.

Of pleading *Nul tiel Record*.

* Coke Ent. 160.
Rast. 334,
335.
Robinson, 214.
Hern. 228.
Vidian 48.
Thomps. 280.
* Mich. 8
Will. 3. Rot. 455.

Per Holt Ch. Just. Where the Record pleaded is in the same Court in which the Action is brought, there Nul tiel Record is not so proper as to crave Oyer of the Record, and that not at a Day to come, but instant; but if the Plaintiff replies Nul tiel Record, 'tis a Traverse of the Defendant's Plea, and such an Entry (as in this Case) is the proper Course, and more to the Defendant's Advantage than Craving Oyer, because he has a Day given him to bring in the Record, and there can be no Trial in this Case, as where the Record is in another Court, and for that Reason 'tis improper to rejoin * quod habetur aliquod tale Recordum, as it ought where the Record is in another Court; for in such Case B. R. awards a Certiorari to that Court, and the Issue is tried by their Certificate, but we cannot award a Certiorari

* *Antea* 3.

rari to our selves; for it would be absurd to certify our selves. Powell, Just. at first was of a contrary Opinion, that this Judgment was not well given, because the Plaintiff had averred his Replication, which Averment ought to have been answered by the Defendant, for otherwise the Record is not closed and perfected; but it being moved again upon another Day, he came over to the Opinion of the Chief Justice.

Sid. 356.

Wherea Record is misrecited, the other Side must not demur.

1 Vent. 212.

Inferior Courts certify *tenorem Recordi*.

(6.) Adjudged, that where a Pleader misrecites a private Act of Parliament, the adverse Party cannot demur, but must plead *Nul tiel Record*, for upon a Demurrer it must be taken to be as pleaded.

7. In an Action of Debt brought upon a Judgment in an Inferior Court, if the Defendant pleads *Nul tiel Record*, they shall certify only *tenorem Recordi*; and the Lord Chief Justice Hale said, that he had seen *Certiorari's* which only certify *tenorem Recordi*.

RECOVERY COMMON.

King *versus* Melling.

2 Lev. 58.

Raym. 425.

1 Vent. 214, 225.

Where a Devise to B. and the Issue of his Body, makes an Estate-tail, and where such an Estate is barred by Common Recovery.

(1.) **T**HIS Case is reported in several Books, (viz.) The Father devised his Lands to his Son B. for Life, and after his Decease, to the Issue of his Body, &c. and for Want of such Issue Remainder over. B. suffered a Common Recovery, and the Question was, what Estate B. had. Two Judges held, that he had only an Estate for Life, because such an Estate was expressly devised to him. But Hale Ch. Just. held, that he had an Estate tail by Implication, and by Consequence the Recovery well suffer'd, for the Words Issue of his Body is *nomen collectivum*, and the Words which follow, (viz.) for Want of such Issue, make an Estate-tail by Implication; but Judgment being given according to the Opinion of those two Judges, it was afterwards reversed in the Exchequer-Chamber, according to the Opinion of the

the Chief Justice ; and there it was held, that where an Estate-tail is barred by a Recovery, all Things depending upon it, as Remainders, and all Things derived out of it, such as Rents, &c. are barred as well as the Estate itself, but nothing which is collateral.

Therefore a Recovery will not bar the Right of a Mortgagee, unless he is vouched, so likewise of an executory Devise ; but it will bar a contingent Remainder.

(2.) So where Tenant for Life, with a Power to make a Jointure on his Wife, suffers a Common Recovery, his Power is extinguished ; but 'tis otherwise where a Power is collateral ; as for Instance, where an Executor has Power to sell.

(3.) One seised in Fee of Lands, granted a Rent de novo to A. in Tail, Remainder to B. in Fee ; A. suffered a Common Recovery, Adjudged, that the Estate-tail was barred, and that the Recoveror had a Fee-simple, which shall not determine, tho' A. die without Issue. 2 Lut. 1225.

(4.) But if the Tertenant grants a Rent de novo to A. in Tail, who suffers a Common Recovery, in this Case likewise the Recoveror hath a Fee-simple, but 'tis determinable upon the Death of A. without Issue ; for the Rent was not perpetual in its Nature, and in such Case the Grantee shall not prejudice the Tertenant.

R E C U S A N T. See

Prohibition.

Qq

R E-

R E L E A S E.

Lacy *versus* Kinnaston. Trin. 13 Will. III. B. R.

2 Salk. 573.
A Release
of all his
Right will
not release
a Judgment
not execu-
ted.

(1.) **T**HIS Case is reported in * 2 Salk. by the Name of Clayton v. Kinnaston, and in the * same Book by the Name of Lacy v. Kinnastone, but I do not find it stated any where, but only that it was held per Holt Ch. Just. that a Perpetual Covenant, as he calls it, (viz.) Never to take any Advantage of a Deed or Covenant, is a Release or Defeasance of that Deed or Covenant; as for Instance, where W. R. enters into an Obligation to H. S. who covenants never to take any Advantage or to sue W. R. upon that Bond; if afterwards an Action of Debt should be brought upon it, in such Case W. R. the Obligor, may plead this Covenant in Bar to the Action, and this to avoid Circuity of Action, for the Obligee by this Covenant hath deprived himself of all the Remedy he can have upon this Bond; but if W. R. and R. W. are jointly and severally bound in a Bond to H. S. who Covenants never to sue W. R. upon that Bond; this is no Release or Defeasance of the Bond, neither can it be pleaded in Bar, if an Action should be brought on it, because it doth not discharge the Right, but only the Remedy against W. R. for he still hath a Right of Action against R. W. the other Obligor; therefore if he (the Obligee) should bring an Action of Debt upon this Bond against W. R. he is put to his Action of Covenant against the Obligee, which would not lie if this Covenant was a Release, because a Release to one Obligee is a Release to both. And per Holt Ch. Just. a Release of all his Right in such Lands will not discharge a Judgment not executed, because such Judgment doth not give or vest any Right, but only makes it obnoxious, and liable to Execution.

1 Lev. 43.

(2.) An Acquittance in Law ought to be a Deed sealed, but the Common Practice is otherwise; an Acquittance for Rent due at Michaelmas last, is a good Discharge of all former Arrears; but 'tis otherwise in an Abowry.

R E M A I N D E R.

(1.) **A** Contingent Remainder cannot depend upon an Estate for Years, because it would make an Abeyance of the Freehold, which the Law will never endure.

(2.) Neither can it depend upon an Estate in Fee, because after such a Disposal the Owner hath no Estate left to limit.

(3.) But it may depend upon an Estate for Life, or upon an Estate Tail, because those are but particular Estates, and a * bare * 2 Lev. 35. Right of Entry will preserve it.

(4.) The Case was, T. P. and W. H. were Jointenants for Life, Remainder to the first Son of T. P. &c. Remainder to the right Heirs of T. P. afterwards the other Jointenant for Life released to T. P. the Question was, whether the contingent Remainder to the first Son of T. P. was destroyed by the Descent of the Inheritance to him as Heir at Law to T. P. and adjudged that it was, because, by the Release of the Jointenant for Life to the other, (viz.) to T. P. the Fee was executed in T. P. the Releasee, and there was no particular Estate left in that Jointenant to support this Remainder. Raym. 412.
1 Vent. 345.
Jones 136.

(5.) The Husband being seised in Fee, devised to his Wife for Life, Remainder to her first Son, Remainder to his own right Heirs; the Husband died and the Widow married again, and she and her Husband, before a Son was born, levied a Fine to one Weston in Fee, the Heir at Law of the Testator having before that Time by Bargain and Sale, and Fine, conveyed the Lands to the said Husband and Wife: adjudged, that the contingent Remainder to the Son was destroyed, because the Reversion in Fee being immediately upon the Death of the Testator, in his Heir at Law; and that Reversion being conveyed by him to the Wife by Bargain and Sale, and Fine, and she having the particular Estate for Life, that Estate for Life was merged in the Conveyance of the Inheritance to her and her Husband; and by Consequence, when the Remainder came in Being, there was nothing to support it; for it shall not be preserved by the Possibility which the Wife had to waive the Estate conveyed to her by the Bargain and Sale, &c. after the Death of her Husband. 2 Saund. 385.
2 Lev. 39.

Thompson *versus* Leech.

3 Lev. 284.
3 Mod. 296.
2 Salk. 517,
618.
2 Vent.

(6.) **T**HIS Case is reported afterwards and in several Books, quod vide in the Margin: But per Holt Ch. Just. where there is a Tenant for Life, with a contingent Remainder, and he (the Tenant for Life) makes a feoffment in Fee upon Condition, and the Contingency happens before the Condition is broken; in such Case the Contingency is for ever destroyed, because there must be a particular Estate in Being, or a present Right of Entry when the Contingency happens.

(7.) But if the Tenant for Life enters for Breach of the Condition before the Contingency happens, then the Contingency is revived and may vest.

(8.) Where there is Tenant for Life with a contingent Remainder to W. R. and then Tenant for Life is disseised, and after that a Descent and five Years is past; now in such Case the contingent Remainder is gone, because there is nothing left to support it, for the Right of Entry is turned into a Right of Action.

Doddington *versus* Kyme.

(9.) **A**Djudged, that after a contingent mean Remainder is once limited, no Estate after limited can be vested, but when a contingent mean Remainder is not in Fee, but only for Life, or in Tail, an Estate after limited by subsequent Words may be vested, as in Lewis Bowles's Case.

But if Lands are devised to A. for Life, and if he hath Issue a Son, then to that Son in Fee; and if he hath no Son, then to B. and his Heirs, no Estate shall vest in B.

Thomson *versus* Leech. Hill. 9 Will. III. B. R.

Where the
Acts of an
Ideot are
void, and
where void-
able.

(10.) **S**imon Leech being Tenant for Life, Remainder in Tail to his first Son, Remainder to Sir Simon in Tail; surrendered to Sir Simon, and afterwards had Issue a Son; and it was found, that the Father was Non Compos when he made this Surrender.

It was insisted, that this Surrender was not void, but only voidable; for as to himself he cannot avoid it by Entry or by Pleading, or by the Writ Dum non fuit compos, which Writ being

being to avoid his own Alienations, supposes that he demise, and so doth the Writ De Ideota inquirend', and the Law needs not prescribe Methods to avoid his Acts, if they are void in themselves.

But it was answered and resolved per Holt Ch. Just. That the Deed of a Person Non Compos is void, that if he Grants a Rent, and the Grantee distrains for the Arrears, he may bring Trespass, that his Letter of Attorney or his Bond are void; 'tis true, the Books say generally, that his Deeds or Bonds are not void, but that must be understood, as that the Obligor cannot plead Non est factum, because it appears to be a Deed fairly executed, but 'tis of no Force, because of this latent Defect or Incapacity, which the Law requires should be pleaded, and put in Issue specially, and so are all his Acts in Pais, except his Feoffments, and Livery and Seisin, and those are only voidable; the Reason is, because of the Respect the Law gives to a Feoffment upon the Account of its Solemnity in the Transmutation of a Freehold; and the Writ De non compos mentis, which says Demise, that must be understood of a Feoffment or a Fine, those being the antient and the only Conveyances at that Time: An Infant runs parallel with an Ideot in all Cases but this, (viz.) that an Ideot is not admitted to disable or stultify himself: And lastly, his Deeds are void, because the Law hath appointed no act to be done for the avoiding them; therefore this Deed of Surrender being void, the particular Estate for Life was not determined by it, and by Consequence the contingent Remainder not destroyed.

(11.) The Attorney-General exhibited a Bill in Equity against the Defendant, to make him accompt to a Lunatick, and to avoid a Bargain made by him, and this was held good, tho' the Lunatick was no Party; for tho' 'tis generally true, that he ought to be made a Party, yet not in this Case, because it would be to stultify himself.

1 Ch. Rep: 112, 153.
Where a Lunatick is to be made a Party, where not.

But where a Bill is brought in Nature of an Information by the Attorney-General in Behalf of a Lunatick, there he ought to be made a Party, if 'tis not directly to stultify himself, as in the Case of an Infant, for he may recover his Understanding, and then he is to have his Estate at his own Disposal.

RENT.

R E N T.

Tregarne *versus* Fletcher. Hill. 8 Will. III. B. R.

2 Salk. 676.
By the Name
of *Tregarne v.*
Fletcher.
Where the
Pleading *inter alia*
is not
good.
Antea Pleas
1. S. P.

(1.) **T**HIS Case is reported in 2 Salk. but quite different: **H.** In Replevin, the Defendant avowed, for that a Rent was granted to him issuing out of Black-acre, inter alia, &c. and that the Rent being in Arrear, he distrained in Black-acre prædict; and upon a Demurrer to this Plea it was adjudged ill, for per Holt Ch. Just. he ought to have set forth the Grant it self, that the Plaintiff might discern it and have an Opportunity to reply an Entry, Ejection, or Recovery, to avoid the Defendant's Title, and the rather, because this was in the Case of a Rent-charge, for in an Assise for such a Rent all the Certenants must be named; besides, the Rent is intire and issues out of every Parcel of the Land charged therewith, so that those Words inter alia shew an Incertainty upon the Face of the Plea it self.

Marckar *versus* Harris. Mich. 4 Will. III. B. R.

Where Nil
habuit in te-
nementis is a
good Plea to
an Action of
Debt for
Rent.
See *Postea*
Replevin 1.
See 3 Lev.
193. *Aylett v.*
Williams and
Lee.

(2.) **I**N an Action of Debt for Rent, the Defendant pleaded, that the Plaintiff Nil habuit in tenementis, &c. The Plaintiff replied, that he was possessed of a Lease in the Tenements for forty Years, made to him by the Lord Wootton, who had Power to demise the same; and upon a Demurrer to this Replication it was adjudged good, without setting out the * Title, for Nil habuit in tenementis is the Issue, and the Plaintiff might reply, Quod satis habuit in tenementis, (viz.) in Fee, or in Tail, &c. and Evidence might be given at the Trial of any other Estate; for where the Issue is Nil habuit in tenementis, the particular Estate alledged in the Pleadings is only Form.

1 Roll. Rep.
So.

(3.) The Lessor made a Lease, (viz.) in Consideration of the Payment of the Rent herein after mentioned, he leased, &c. and afterwards in this Lease the Lessee covenanted with the Lessor, his Heirs and Assigns, to pay 10 l. yearly: adjudged, this was a Rent and not a Sum in Gross; for as a Contract is actus contra actum,

actum, so a Covenant is convenire, which ex vi Termini ought to be on both Sides, therefore the Word Covenant must relate to both.

(4.) In Debt for Rent, the Plaintiff declared on a Lease at Will, dated 25th March, rendering 10l. Rent by quarterly Payments, and that he (the Defendant) entred, and was possessed till Christmas, following, and for 50 s. for a Quarter's Rent, ending at Christmas this Action was brought; and upon a Demurrer to the Declaration, it was objected against the Plaintiff, that he had sued for a Quarter's Rent due at Christmas, when two Quarters more were due, (viz.) Midsummer and Michaelmas Rent, and so the Action was brought for less than was due, without shewing how the Rent was discharged: Sed per Curiam, every Quarter's Rent is a several Debt, for which distinct Actions may be brought; and so not like an Action of Debt for Part of the Money upon an entire Contract.

2 Vent. 129.
Where an
Action of
Debt is
brought up-
on an entire
Contract, and
where not.

(5.) Lease to the Defendant for twenty one Years, rendering Rent, afterwards the Lessor, who had the Fee, granted the Rent to the Plaintiff, but not the Reversion, and the Grantee of this Rent brought an Action of Debt for the Rent Arrear; the Defendant pleaded Nil debet, upon which they were at Issue, and the Plaintiff had a Verdict; the Court was divided, whether an Action of Debt would lie; two Judges of Opinion, that it did not, because there was no Privity of Contract between the Grantee of the Rent, and the Lessee; two other Judges of another Opinion, because the Rent was originally subject to an Action of Debt, and tho' 'tis now in another, (viz.) in the Hands of the Grantee, yet the Law is still the same; besides, here is a Privity of Contract between them, because the Lessee having attorned to the Grantee of the Rent, this Attornment is quasi a new Contract between them. See the Case of Ards v. Watkyns.

Raym. 11.
Whether
Debt will lie
where there
is no Privity
of Contract.

(6.) If Tenant in Fee or in Tail die, his Executor may have an Action of Debt by the Statute 32 H. 8. for the Rent Arrear, and due in the Life-Time of the Testator, or he may distrain; but before this Act the Executor had no Remedy at Common Law.

Remedies by
the Statute
32 H. 8. cap.
7. See the
Case of How-
ell v. Bell.

(7.) So it was in the Case of a Tenant pur autre vie, for his Executor had no Remedy till the Death of Cestui que vie; but now he may distrain, or have an Action of Debt for the Rent Arrear.

1 Cro. 471.

(8.) If

(8.) If Tenant for Life die, his Executor might bring an Action of Debt for the Rent Arrear, and this was his Remedy at Common Law; but a new Remedy is given by this Statute, and that is to distrain.

(9.) But if a Grantee of a Rent for twenty Years, if he so long live, and there is Rent in Arrear, and then the Grantee dies, his Executor cannot distrain for the Arrears within this Statute, but must keep to his Remedy at Common Law.

(10.) If Tenant in Fee had made a Lease for Years, he or his Executors might have an Action of Debt at Common Law for the Rent Arrear, but not if he had made a Gift in Tail, or Lease for Life; because in such Case the Rent is a Freehold, and an Action of Debt being only a personal Action, lies only for a Chattel Interest: But now an Executor may bring Debt within this Statute, but this must be intended where the Rent issues out of Freehold, and not Copyhold Lands.

Yelv. 135.

Vent. 259.

(11.) Lessee for Years died Intestate, his Administrator made an Underlease to W. R. and died: Adjudged, that his Executor or Administrator may have an Action of Debt for the Rent Arrear upon the Underlease, and not the Administrator de Bonis non of the Lessee, tho' he hath the Reversion, for he comes in by a Collateral Title paramount the Lease.

REPLEADER. *See* Default, 1.

Witts *versus* Polehampton. Mich. 10 Will. III.
B. R.

(1.) **P**ER Holt Ch. Just. Where the Plea of the Defendant confesses the Duty for which the Plaintiff declared, but doth not sufficiently avoid it, and thereupon Issue is joined on an immaterial Thing, if 'tis found for the Plaintiff, he shall have Judgment, tho' the Issue was immaterial; but where the Defendant's Plea avoids the Plaintiff's Duty, who replies and traverses a Matter not material, and Issue is taken upon such * immaterial Traverse, and 'tis found for him, the Statute of Jeofailes will not help in such Case; but there must be a Repleader.

Difference where the Issue is immaterial, and where 'tis taken upon an immaterial Traverse.

* Cro. Eliz. 24, 104.

5 Rep. Nicholls's Case.

2 Cro. 5. Where the Issue is immaterial.

(2.) Trover against Husband and Wife, upon the Conversion made by the Wife to her own Use, they pleaded, quod ipsi non sunt culpabiles, upon which they were at Issue, and the Plaintiff had a Verdict; but a Repleader was awarded, because the Wrong done being alledged to be done by the Wife, and none by the Husband, the Issue should have been quod ipsa non est culpabilis.

(3.) But tho' a Repleader hath been allowed after a Verdict, as in the Case last mentioned, it was never yet allowed after a Demurrer; so it was reported by Mr. Latch; but since his Time it hath been allowed; as for Instance.

Repleader allowed after a Verdict, but never after a Demurrer. Latch 147.

(4.) In a Quantum meruit by a Surgeon for curing a Wound, the Defendant pleaded a Tender of two Guineas Value 45 s. which was sufficient and traversed, that the Plaintiff deserved more; and upon a Demurrer to this Plea it was adjudged to be ill, because the Traverse made it double and impertinent; besides no such Value could be set on Guineas, and a Repleader was awarded, but without a Traverse, and the Plea was to be of a Tender of 45 s. and Issue to be taken of the Sufficiency thereof; 'tis true, it hath been often denied, that any Repleader

3 Lev. 449. Repleader allowed after a Demurrer argued.

R r

Should

should be after a Demurrer, but only after Issue joined; but here it was not only after a Demurrer, but after that Demurrer was argued.

Mod. Cases,
102.
No Repleader after a
Demurrer,
nor a Writ
of Error.

(5.) And yet since this last Case it hath been ruled, that a Repleader can never be awarded after a Demurrer, nor after a Writ of Error, but only after Issue joined.

Replevin and Avowry.

Challoner *versus* Clayton. Pasch. 10 Will. III.

In Replevin the Defendant avowed and did not set forth any Title, nor good.
See *Antea*
Rent 2.

* See *Freeman*
v. Fugg.
Postea 3.

(1.) **I**N Replevin, the Defendant avowed for Rent, setting forth, that he was possessed of an house for several Years yet to come, and being so possessed, he demised it to the Plaintiff for one Year, rendering Rent, &c. The Plaintiff replied, that the Defendant Nihil habuit in Tenementis; the Defendant rejoined quod satis habuit, &c. and upon a Demurrer to this Rejoinder Mr. Northey moved to amend it, for that he could not make good his Avowry, there being no * Title set forth; 'tis true, in an Action of Debt for Rent reserved upon a Lease, the Defendant may plead Nihil habuit in Tenementis, and the Plaintiff in his Replication may shew Title, because quod cum dimisit is a sufficient Allegation in a Declaration; but in an Avowry a Title should be shewn, and therefore 'tis not proper in a Rejoinder.

Baker *versus* Lade. Mich. 4 Will. III. B. R.

5 Mod.
Where a
Deed must
be pleaded
as it operates
by Law.

(2.) **I**N Replevin, the Defendant avowed for a Rent-Charge, setting forth, that his Father was seised in Fee, and in Consideration of 5 s. and natural Affection dedit & concessit the Reversion to him, that this Grant was without any Attornment, and that it did operate as a Covenant to stand seised, &c. and

and upon a Demurrer, three Judges in the * Common Pleas held the Plea to be good by the Words Dedit & Concessit, because the Court will judge what the Law is upon those Words, (viz.) that it will amount to a Covenant to stand seised; but Pollexfen Ch. Just. held the Plea to be ill, for that the Defendant ought to have pleaded according to the Operation of this Deed by Law, (viz.) that his Father did covenant to stand seised, and not by the Words Dedit & Concessit; and thereupon a Writ of Error was brought in B. R. and according to the Opinion of Pollexfen, the Judgment was reversed, (viz.) that this Deed should have been pleaded according to the Operation of Law.

* 4 Mod. 149.
2 Vent. 260.
3 Lev. 291.

Freeman *versus* Jugg. Trin. 12 Will. III. B. R.

(3.) **I**N Replevin for taking a Horse, the Defendant avowed, that he was possessed of the Close, being the Locus in quo, &c. for a Term of Years yet to come, and being so possessed, the Horse was Damage-feasant there, &c. the Plaintiff replied, that the Defendant was to keep up his Fences round the said Close, but that the same being down, and out of Repair, the Horse escaped into the Close for Want of good Fences, upon which they were at Issue, and at the Trial the Plaintiff was Nonsuit; and now it was moved in Arrest of Judgment, that this Avowry was ill, because in all Avowries for Damage-feasant, the Avowant must shew where the * Fee is, and how the particular Estate is derived, quod fuit concessum per Curiam, if there is a Demurrer to such Avowry; but because the Plaintiff by his Replication had waived that Matter, and confessed and admitted a Possession in the Avowant, that is sufficient to justify a Distress Damage-feasant, and hath cured this Defect in the Avowry.

In Avowries for Damage-feasant, the Avowant must shew where the Fee is, and how the particular Estate is derived.

* See Chalmers v. Cleyton. Antea 1.

(4.) In Replevin, the General Issue is Non Cepit. but the Defendant may plead Property in himself, and this he may do, either in Bar or in Abatement to the Action; but if he plead Property in a Stranger, he must conclude in Abatement; and 'tis to be observed, that upon the General Issue, Property cannot be given in Evidence, therefore it must be pleaded there, as to the Plaintiff in Replevin, he must have a Property either general or special, and his Replevin must be either in Detinuit or Detinet; if in the first Case, then the Plaintiff hath his Goods again, and the Action is brought only for Damages in the Taking and Detaining; if 'tis brought in the Detinet, then 'tis where the Goods are still detained from him.

Vent 249.
In Replevin, the Defendant may plead Property either in Bar or Abatement.

2 Lut. 1151.

The Declaration must be not only of a Taking in a Mill or Town; but in quodam loco vocat', &c. otherwise 'tis naught upon a Demurrer, but such a Declaration in an Action of Trespass is good.

Litt. 37.

Replevin for Taking several of his Beasts in quibusdam locis, called A. and B. upon a Demurrer to this Declaration it was held ill, because the Plaintiff ought to shew how many were taken in one Place, and how many in another Place.

Jones 414.

The Defendant in Replevin had no Damages given at Common Law, but this is by the Statute 7 and 21 H. 8.

R E Q U E S T.

Resolutions where a Special Request is to be made, and where a General *Licet sapius requisitus*, &c. is sufficient.

Allen 25.

(1.) IF I promise B. to deliver him two Pipes of Wine out of my Cellar, to be chosen by him, in such Case he must make the Request, but if I promise B. to deliver to C. two Pipes of Wine to be chosen by C. I must Request him to choose them.

Noy 95.
Latch 93,
209.
3 Leon. 200.

(2.) Where a Man promiseth to pay a precedent Duty, there *Licet sapius requisitus* is sufficient, because there was a Duty without the Promise, as if one buy or borrow my horse, and promiseth to pay so much upon Request.

* 1 Saund. 35.

(3.) But if the Promise is collateral, as for Instance, to pay the Debt of a Stranger upon Request; there the Request is Part of the Agreement and traversable, for there was no Duty before the Promise made, and for that Reason the Request must be specially alledged, for the Bringing the Action will not be a sufficient Request; * so likewise where there are mutual Promises to pay each other 4 l. upon Request, if they do not perform such an Award, the Request must be specially alledged.

(4.) But as to this Matter, there is some Difference in the Action brought; for if I promise to redeliver, upon Request, such Goods as were delivered to me, there if an Action of Detinue is brought, the Plaintiff need not alledge a Special Request, because there was a precedent Duty as aforesaid, and the Action is brought for the Thing it self.

(5.) But if an Action on the Case is brought for these Goods, Sid. 66. then the Request must be specially alledged; for 'tis not brought for the Thing it self, but for Damages.

(6.) Where a Promise is made to pay Money to the Plaintiff upon Request, there needs no Special Request; but if the Promise was made to A. to pay B. so much Money upon Request; there must be a Special Request alledged; and so, if the Promise was made to the Plaintiff himself to do any collateral Act upon Request, as to purchase, &c. there must be a Special Request alledged.

Fitzhugh versus Dennington. Mich. 3 Annæ.

(7.) **D**EBT upon a Bond conditioned at the End of seven Years, to make the Plaintiff free of the Joiner's Company, if requested thereunto; the Defendant pleaded, that at the End of seven Years he was not requested, and upon Demurrer to this Plea the Defendant had Judgment, because the Request being to do a collateral Thing; and being Part of the Condition, ought to have been averred by the Plaintiff, which he had not done; 'tis true, it was objected against the Plea, that the Defendant should have pleaded generally, that he was not requested, but he had pleaded, that he was not requested at the End of seven Years, &c. it should have been before the End of seven Years: But per Curiam, the Condition was not to make the Plaintiff free, post terminum of seven Years, but ad terminum, and the End of a Thing is always Part of that of which 'tis an End, so that he was to be made free on the last Day of the seven Years, and to make a Request some Time of that Day, so that the Defendant might have a reasonable Time to procure it to be done. 2 Salk. 585. Where a Request is to do a collateral Thing, it must be averred.

(8.) The Defendant borrowed Money for the Use of his Mother, and gave Bond to pay it on Demand, if his Mother did not; and in an Action of Debt brought on this Bond, the Defendant after Oyer demurred to the Declaration, for that the Plaintiff did not lay any Special Request, when, and where he required the Mother to pay it, and that the general Allegation Licet Mod. Cases 200. Where there is a Duty before a Demand made, there licet sapienter requisitus is sufficient.

sepius requisitus will not be sufficient, which is very true, where there is no Duty till a Demand made; but per Curiam, here was a Duty ab initio, which the Law makes payable on Demand, and in such Case 'tis not necessary to alledge an exprels Demand.

1 Vent. 71,

74.

Where a special Request need not be alledged.

(9.) Case, &c. in which the Plaintiff declared, that T. S. owed him 20l. and that the Defendant owed T. S. 20l. and that in Consideration, the Plaintiff, at the Special Instance and Request of the Defendant would procure an Order from T. S. directed to the Defendant, to pay the 20l. to the Plaintiff; he the Defendant promised to pay it, that accordingly, he (the Plaintiff) did procure an Order, &c. which he shewed to the Defendant, and required him to pay the Money, which he refused; and upon a Demurrer to this Declaration it was objected, that he did not alledge that he procured this Order at the Request of the Defendant, and since the Promise was not made on a Consideration of a Duty to the Plaintiff himself, but in Consideration of a collateral Duty which became due upon a Special Promise, therefore a Request should be alledged to pay the Money, and both the Time and Place set forth specially: Sed per Curiam, no other Request is necessary than what is set forth in the Agreement, (viz.) that the Plaintiff, at the Request of the Defendant, did procure the Order, and no subsequent Request was intended.

R E S C O U S.

Anonymus. Mich. 8 Will. III. C. B.

(1.) **P**ER Treby Ch. Just. of C. B. upon an unlawful Distress, the Owner of the Cattle may rescue them before impounding, but not after.

4 Lev. 26.

(2.) Rescous was returned to be done to the Bailiff: Et per Curiam, 'tis good, whether he be Bailiff of a Franchise, or the Sheriff's Bailiff.

(3.) Case against the Sheriff upon an Escape on mesne Process, the Defendant pleaded a Rescous, and upon a Demurrer to this Plea he had Judgment, tho' he did not set forth, that the Rescous was returned. 3 Lev. 46.

(4.) Where a Bailiff hath a Warrant to arrest a Man, and is hindered in the Execution of his Office, this is no Rescous unless there was an actual Arrest; but 'tis a Misdemeanor and Contempt of that Court out of which the Process issues. Mod. Cases, 210.

(5.) Case against the Defendant for a Rescous upon mesne Process; the Evidence at the Trial was, that the Bailiff stood at the Street Door, and sent his follower up three Pair of Stairs in a disguised habit, with the Warrant, who laid hands on W. R. and told him, that he arrested him; but W. R. with the help of some Women got from the follower and ran down Stairs, and the Defendant hearing a Noise, run up and put the said W. R. into a Room, then locked the Door and would not suffer the Bailiff to enter. Holt Ch. Just. doubted whether this was a lawful Arrest, being by the Bailiff's Servant or follower, and not in the Presence of the Bailiff himself; but said, that the Plaintiff must prove his Cause of Action against W. R. and that he must prove the Writ and Warrant, by producing sworn Copies of them, and he must prove the Manner of the Arrest, that it may appear to the Court to be a lawful Arrest; and in Point of Damages, he must likewise prove the Loss of his Debt, (viz.) that W. R. became insolvent, or could not be retaken. Mod. Cases, 211.
What is a Rescous.

R E-

RESERVATION.

¹ Vent. 161.
Reservation,
what it is.

(1.) **A** Reservation is a Kind of a Return of something back in Retribution of what passes away; and therefore whatever it is, it shall be carried over to him who should have succeeded to the Estate, or to the Thing demised, if no Lease had been made; and therefore, where a Man seised in Fee makes a Lease for Years, reserving Rent, this Rent is descendable to the Heir, as the Land it self out of which it Issues doth descend, because it comes in Lieu of that which should have descended.

² Saund.

(2.) The Tenant in Fee-simple made a Lease for Years, reserving Rent to him and to his Executors; per Curiam, the Rent shall not go to them, because 'tis not a Testamentary Estate, and therefore it shall determine with the Life of the Lessor.

(3.) So if Lessee for 100 Years, make a Lease for forty Years, rendering Rent to him and his Heirs, this is void as to his Heirs, and shall likewise determine with the Life of the Lessor.

(5.) So likewise, if the Rent is reserved to himself, without any other additional Words, because the Rent is a new Creature, and cannot have a longer Duration than its Creation gave it.

¹ Vent. 162.

(5.) But if Tenant in Fee make a Lease for Years, reserving Rent to him and his Assigns, this shall go to his Heirs.

(6.) If 'tis reserved to him and his Assigns durante Termino, &c. or to him durante Termino, or to him and his Executors durante Termino; in these Cases those Additional Words shew, that the Rent should continue to be paid as long as the Term is in Being, and in such Case, it shall descend with the Reversion to the Heir at Law, and the Word Executor is void, and the Reservation shall be as if it had been to him only during the Term.

¹ Vent. 172.

(7.) Lessee for Years surrendered to the Lessor by Parol, reserving a Rent: Adjudged, that this was a good Reservation upon the Contract, and that an Action of Debt would lie for the Rent after the first Day of Payment incurred, tho' the

Reservation was by Way of Contract, and without any Deed.

RESTITUTION.

The King versus Harris. Trin. II Will. III.
B. R.

(1.) **T**HE Case was, Harris was ousted by a Vi Liaca amovendo, and Morgan put into Possession; afterwards Harris got the Justices of the Peace to inquire into the Force, and accordingly, on the 20th of October, 1695. an Inquisition was taken, by which it was found, that Morgan forcibly entered and detained the Church, and about three Years and two Months after this Inquisition was taken, (viz.) in December, 1698. the Justices awarded a Precept to restore Harris, which was executed; and thereupon Morgan brought a Certiorari, to remove this Inquisition into B. R. and a Writ of Restitution was awarded, with this Entry, Quia constat nobis super separalia Sacramenta, quod Restitutio superinde was not made, till three Years after the Inquisition taken, &c. for the Statute intended a speedy Remedy for the Possession, which was lost, without trying the Right, and an Execution so long after is not a fresh Pursuit, and might be dangerous to Purchasers; and 'tis in this Case as in the Case of a Conviction of a forcible Entry upon Utiw, upon the Statute * 15 Rich. 2. where the Commitment must be made presently.

5 Mod. 443.
Where Restitution was not made till three Years after the Inquisition, 'tis not good.

* 15 Rich. 2. cap.

(2.) The Defendant's Goods were seized, being imported contrary to the Act of Navigation, and afterwards the Property was claimed by C. and others; and the Question was, whether the Court ought to grant Writs of Restitution, ex debito Justitiæ, upon giving Security; and adjudged not, for 'tis discretionary in the Court, and if granted, 'tis ex gratia.

Hardr. 97.
Where a Writ of Restitution is ex gratia.

Formerly the King never proceeded on an Indictment till a Year after the Offence, that the Party might bring an Appeal.

(3) At Common Law where Goods were feloniously taken away, the Owner had no Remedy to recover them but by Appeal; and therefore, if the Party was indicted before the Appeal brought, and either convicted or acquitted, the Appeal was barred, and consequently the Owner lost his Goods for ever; for if convicted, they were forfeited to the King, and if acquitted, that was a good Bar to the Appeal; therefore in favour to the Owner, and to give him a reasonable Time to bring his Appeal, the King seldom proceeded by Way of Indictment till a full Year after the Offence done. But then there was this Inconvenience, that the King's Evidence were either kept Secret or died, and the Party would bring no Appeal; therefore by the Statute 21 H. 8. cap. 11. the Owner had the same Advantage upon a Conviction as he had upon the Appeal (viz) that a Writ of Restitution should be awarded as well upon a Conviction on an Indictment, as on an Appeal.

Returns of Process.

Yelv. 34.
Before the Statute of Ed. 2. the Sheriff never put his Name to a Return.

(1.) Before the Statute of Ed. 2. the Sheriff or other Officer never put his Name to the Return, but now by that Statute he must do it; and therefore, as at Common Law, the Party might say, that the Sheriff did not make the Return, because his Name was not endorsed, so he may still, tho' his Name is endorsed, because the Statute hath not taken away that Averment, for the Party may aver, that he who endorsed the Writ is not Sheriff.

Sid. 23.
If he return Cepi Corpus, and hath not the Body ready, he shall be amerced.
Postea 4. S. P.

(2.) At Common Law, if the Sheriff had made a False Return, or no Return at all, an Action on the Case would lie against him.

1 Vent. 55, 85.

(3.) But if he return Cepi Corpus, and hath not the Body ready at the Day, he shall be amerced till he have him, or assign the Bail-Bond to the Plaintiff, but no Action lies against him in this Case for a False Return, because he is compellable to take Bail. But if an Action should be brought against him he ought not to demur to the Declaration, but to plead the Statute by which he is compellable to take Bail.

(4.) Case against the Sheriffs of London and Middlesex, for a false Return of a Bill of Middlesex, which was *Cepi Corpus* and *paratum habeo*, when in Truth they had not the Body at the Day of the Return of the Writ; the Defendants pleaded the Statute 23 H. 6. that they took Bail for the Appearance of the Prisoner, and so discharged him, and that at the Day of the Return of the Writ, they returned *Cepi Corpus*, &c. The Plaintiff replied *Protestando*, that the Defendants did not take sufficient Bail, &c. and then pleaded, that they had not the Body ready; and upon a Demurrer to this Replication it was insisted for the Plaintiff, that tho' an Action for an Escape would not in this Case lie against the Sheriff, because he is enjoined by the Statute to take Bail, yet an Action for this false Return will lie: But per Curiam, at Common Law there was no other Return than *Cepi Corpus*, or *Non est Inventus*; and that this Statute makes no Alteration of the Returns; and by Consequence no Action lies against him for returning *Cepi Corpus*, and the Words *Paratum habeo* makes him liable to be amerced till he hath the Body.

1 Mod. 239.
2 Mod. 83.
Where the Sheriff returns a *Cepi Corpus*, and hath not the Body ready, he shall be amerced.
Antea 3. S.P.

REVOCATION.

Countess of Bridgwater versus Duke of Bolton:

(1.) **I**N this Case it was held by Powis Serjeant, and admitted by Mr. Cowper on the other Side, as often adjudged in Chancery, that where the Testator is seised in Fee, and by his Last Will deviseth his Lands to W. R. in Fee, and afterwards he mortgages the same Lands in Fee to W. W. and then dies before the Principal and Interest is paid, that this Mortgage doth not amount to a total Revocation of the Will, but only *quoad* so much, for which the Lands were mortgaged, and that the Devisee shall have the Equity of Redemption.

1 Salk. 236.
Where a Man mortgages his Lands after he hath devised them by Will, 'tis only a Revocation, *quoad* so much as is mortgaged.

Hard. 375.
Where a
subsequent
Will shall not
revoke a
former.

(2.) The Testator made a Will of Lands, and afterwards he made another Will, but it did not appear that any Lands were devised by this subsequent Will; and this Matter being found in a Special Verdict, Hale Ch. Just. held, that a second Will substantive, and independant of the first, is a Revocation thereof, whether 'tis consistent or not; but if it be depending on the first Will, or relative to it, 'tis not a Revocation so far as 'tis consistent, because it may be in Confirmation of the first Will; and this might be so in the principal Case, for any Thing appears to the contrary.

Where a
Fine and
Deed make a
Revocation,
when one
will not do
it.

(3.) A Settlement was made, and therein a Power was reserved to revoke by Indenture sealed in the Presence of three Witnesses; afterwards, the Party, without taking Notice of his Power, covenanted by Indenture to levy a Fine to other Uses, which Indenture was sealed in the Presence of three Witnesses, and afterwards a Fine was levied accordingly; the Question was, whether this was a Revocation of the first Settlement: Et per Curiam, the Covenant alone will not do it, because it raises no Uses, nor passes any Estate; and the Fine alone will not do it, because 'tis no Indenture in the strict Acceptation of the Word, but both together make a good Conveyance, and by Consequence a good Revocation.

1 Vent. 197.
1 Ch. Rep.
241.
contra.

(4.) Where a Feoffment is made to Uses, with a Power to revoke and limit new Uses, there the Feoffor may revoke and limit in infinitum; but where the Power is only to revoke, there, when that Power is executed, he cannot limit new Uses.

R I O T.

Anonymus. Pasch. 1 Will. III. B. R.

(1.) **P**ER Holt Ch. Just. an Indictment against W. R. for that he cum multis aliis at H. &c. did commit a Riot, is good.

(2.) Adjudged, that where Rioters are convicted upon View of two Justices, the Sheriff must be a Party to the Inquisition, upon the Statute 13 H. 4. but if they disperse themselves before Conviction, the Sheriff need not be a Party, for in such Case the two Justices may make the Inquisition without him, and this is pro Domino Rege; but if the Justices neglect to make an Inquisition within a Month after the Riot, they are punishable, but the Lapse of the Month doth not determine that Authority to make an Inquisition, but only subjects them to a Penalty for not doing it within that Time.

Where the Sheriff must be a Party to an Inquisition for a Riot, where not.

(3.) One Tempest, and two more, were convicted for a Riot, upon View of two Justices, and of the Sheriff of the County, contra formam Statuti, and they were fined by the two Justices; and upon a Writ of Error brought, the Error assigned was, that the Sheriff did not join with the Justices in setting the Fine, when the Statute expressly requires, that he should be joined with the Justices in the whole Proceedings, and for this Cause the Judgment was reversed.

Raym. 386.

13 H. 4. cap. 7.

(4.) Several were indicted for a Riot, it was moved, that the Prosecutor might Name two or three, and try it against them, and that the rest might enter into a Rule to plead Not guilty, and a Rule was made accordingly, this being to prevent the Charges in putting them all to plead.

Mod. Cases
212.

School and School-master.

Matthews *versus* Burdett. Hill. 1 Annæ.

2 Salk. 672.
The Bishop
is to license
School-ma-
sters.
* Styl. Ori-
gines 210,
211, 212.
Linwood
282.
Poph. 170.
Noy 184.
Hutt. 100.
Spar. Coll. 79,
179, 225.
1 Mod. 3.
See Codex,
Lib. 10. Tit.
52.
Spelman
Concilia 2.
Voll. 176.

(1.) **I**N a Prohibition, &c. for teaching School without a Licence: This Case is reported in 2 Salk. to which may be added Mr. Cowper's Argument against the Prohibition, (viz.) That it appears by the Books and Authorities in the * Margin, that the licensing School-masters, &c. belonged to the Bishop; and by the Statute 2 H. 4. cap. 15. not printed, the Bishop may punish such as teach School without Licence; that 'tis very necessary such a Care and Power should be lodged somewhere, and in no Person fitter than the Bishop, and therefore he had, Time out of Mind, exercised this Power of licensing and punishing those who teach without License, and that no other Person pretended to any Power to regulate in this Matter, excepting only the Bishop, and this both before and since the Reformation, that an immemorial Usage did vest a Right as well in the Spiritual as Temporal Courts, and that a legal Foundation must be intended for such an Usage, and even an Act of Parliament for that Purpose, if nothing else would be sufficient.

Dr. Lake, a Civilian, econtra argued, that amongst the Romans there was a Jus Pontificum, but Schools did not belong to them, for School-masters were put in by the supreme Magistrate of the Town, and he it was that paid them.

'Tis true, amongst the Christians, the Bishops did erect Schools, and did appoint School-masters, and paid them, but this was when the Bishop received the whole Ecclesiastical Revenue, which was then wholly subject to his Appointment, out of which Part was appropriated for the Maintenance of Schools and of the Clergy, but those were Schools of Divinity, and so not like the principal Case, and few were permitted to be School-masters, unless they were Churchmen.

2 Lev. 222.

* 13 Car. 2.

(2.) Libel in the Spiritual Court for teaching School without a License; and upon a Motion for a Prohibition it was denied, for tho' the Act of * Uniformity gives the Penalty of 5 l. for this Offence, yet it doth not deprive the Ecclesiastical Courts of their

Jurisdiction in such Cases, when they proceed according to the Canon, and not upon this Act for the Penalty; and the Canons made Anno 21 Jac. and in the Year 1571. before his Reign, are made good and valid by the Statute * 25 H. 8. so long as they are not against the Common Law, or the King's Prerogative, and a Licence of a School by a Bishop, is against neither.

See Cro. Car.
229.
1 Mod. 21.
Jones 320.
* Cap. 19.

SCIRE FACIAS.

Withers *versus* Harris. Mich. 1 Annæ.

(1) Judgment in Ejectment, and after a Year and a Day there was an Habere facias possessionem, without bringing a Scire facias, and adjudged, that it * ought to be brought as well against the Certenants as the Defendant; because as to the Possession an Ejectment is a real Action, it binds the Right if the Plaintiff recovers, and makes a good Title: And Holt Ch. Just. said, that he was not satisfied with that Opinion of my Lord Coke, upon the the Statute of Westm. 2. that by the Common Law a Scire facias would not lie upon a Judgment even in personal Actions, because those general Words live alia quæcunque irrotulata, coming after the Words conventus contracta, &c. which are in their own Nature inferior to Judgments, cannot extend to Judgments which are Superior; but the Law having been taken to be otherwise, he would not argue against it.

Farr. 50.
1 Salk. 258.
* Sid. 317, 361.
Judgment in Ejectment after a Year and a Day, a Scire facias must be brought before an Habere facias possessionem.

Anonymus. Mich. 1 Annæ.

(2.) After Judgment in Ejectment, where there are more Plaintiffs or Defendants than one, after the Death of one of them, Execution may be taken out by the Survivors, without a Scire facias, upon making a Suggestion on the Roll, that one of them is dead; but it may be a Question, where there is but one Defendant, whether Execution can be taken after his Death, without a Scire facias.

Judgment in Ejectment, one dies, Execution may be taken by the Survivors.

Snow

Snow versus Manucaptors of Firebrass. Mich. 1 Annæ.

Scire facias
against the
Bail, for that
the Principal
had not ren-
dered him-
self prisonæ
Marescalli,
&c.

(3.) **S**Cire facias against the Bail; the Breach assigned in the Writ was, that the Principal had not rendered himself prisonæ Marescalli marescalciæ Domini Regis, omitting the Words which usually follow, (viz.) coram ipso Rege; and for this Demission it was insisted, that the Writ was not good, for the King has another Marshal, and that is the Marshal of the Household. Sed per Holt Ch. Just. & Powel Just. The Earl Marshal of England, by his Office, is Marshal of the King's Bench, as appears by the Book of H. 6. and so it continued till the Reign of King James the first, when the Office Marescalli marescalciæ, was derived out of it; so that the Marshal of the King is the Marshal of the King's Bench, and no other Person can be understood by it; the other is Marescallus Hospitii, and never mentioned without that Addition.

Manning versus Bois. Hill. 2 & 3 Will. & Mar. Rot. 645. C. B.

Scire facias
returnable
on such a
Day, *ubicunq;*
tunc fuerimus,
not good..

(4.) **A**fter a Writ of Error brought on a Judgment in C. B. there was a Sci' fa' Teste 28 Novemb. returnable die veneris proxime post Octabis Sancti Hillari, ubicunque tunc fuerimus in Anglia, to shew Cause quare Executionem non habet; to which the Defendant demurred, and it was held, that such Writs of Sci' fa' were made returnable sometimes at a Day certain, and sometimes upon Common Days; but that this Writ returnable on a Day certain, ubicunque, &c. was naught, for it ought to be returnable on a Common Day, if it be coram nobis ubicunque, &c.

Guillam versus Hardisty. Pasch. 9 Will. III. B. R.

Scire facias,
reciting a
Judgment in
an Inferior
Court, *sicut*
per inspectio-
nem, ill.

(5.) **P**ER Holt Ch. Just. and the Court, where a Sci' fa' is brought in B. R. upon a Judgment in an Inferior Court, it must appear in the Writ it self, how the Judgment came into B. R. (viz.) whether by Certiorari, or by Writ of Error, because the Execution is different; for if it came in by Certiorari the Sci' fa' must set forth the Limits of the Inferior Jurisdiction, and pray Execution within those particular Limits; and also that the Judgment came in by Certiorari, but if it came in by Writ of Error, that must be shewn in the Sci' fa' it self likewise, and pray
Cre.

Execution generally : And whereas the Sci' fa' in the Principal Case recited the Judgment in the Inferior Court, sicut per inspectionem Recordi nobis constat, it was for that Reason ill ; for it ought to be sicut patet per Recordum, because if the Defendant should plead Nul tiel Record, it must be tried by the Record it self, and not by Inspection, so this Scire facias was quashed.

Adams *versus* Tertenants of Savage. Mich.
3 Anna.

(6.) **I**N this Case (which see i Salk. 40. it was held by Holt Ch. Just. That where a Scire facias brought against Tertenants is General, as usually it is in C. B. 'tis not proper for the Defendant to plead in Abatement, that there are other Tertenants not named, and so pray Judgment of the Writ, & quod breve prædict' cassetur ; but to pray Judgment, if without them, respondere debet ; but where the Scire facias is Particular (i. e.) naming the particular Tenants, in such Case the Defendant may pray Judgment of the Writ, and there being some Doubt, whether the Tertenants could plead other Tertenants in another County not named, &c. The Chief Just. cited * Owen's Reports, that Tenant for Years might be a good Tenant to plead in Bar to a Scire facias in a personal Action, where Damages are to be recovered, but not to a Scire facias in a real Action.

1 Salk. 40.
Where a *Sci-
re facias* a-
gainst Ter-
tenants is
General, 'tis
not proper
for the De-
fendant to
plead in A-
batement,
that there
are other
Tertenants.
2 Cro. 506.
Co. Ent. 624.
Cro. Eliz.
740.
Moor 524.
2 Saund. 8.
Palm. 241.
2 Roll. Rep.
53.
* Owen 104.
On what
Judgment a
Scire facias
would lie at
Common
Law, and
what not.
Sid. 53.
After a Judg-
ment is a
Year old, the
Plaintiff may
have an
Action of
Debt, or a
Scire facias.
1 Vent. 46.
Difference
where a *Sci-
re facias* is
brought on a
Judgment in
B. R. and in
C. B.

(7.) At Common Law a Scire facias would lie upon a Judgment in a real Action, because the Party could have no new Original ; but it would not lie upon a Judgment in a personal Action till the Statute of Westm' 2.

(8.) Where a Judgment has slept a Year and a Day, the Party shall not have either a Ca. sa. or Fi. fa. but is put to his Action of Debt upon the Judgment, or to a Scire facias, unless he continued the Process, or the Defendant brought a Writ of Error, and the Judgment was affirmed, for this is a Reviver ; but it may be a Question, if the Writ of Error be discontinued, or the Plaintiff in Error be Nonsuit.

(9.) Where a Scire facias is brought on a Judgment in B. R. the Plaintiff must shew where the Court of B. R. was held, because that Court is Ambulatory, ubicunque fuerimus in Anglia ; but if it be brought upon a Judgment in C. B. 'tis otherwise, because the Court of Common Pleas is confined to a certain Place.

Mod. Cafes,
14, 212.
Where a
Judgment by
Warrant of
Attorney is
not entered
within a Year
after, it shall
not be enter-
ed without
Leave of the
Court.

(10.) It was moved to set aside an Execution, for that it was irregular, the Defendant alledging, that when he confessed the Judgment, the Plaintiff and he agreed, that Execution should not be taken till after a Year; the Plaintiff insisted, that he had paid a Year after the Defendant had given the Warrant of Attorney to confess Judgment; then the Question was, whether the Year should be computed from the Date of the Judgment, or from the Date of the Warrant of Attorney. Et per Curiam, It seems necessary that the Plaintiff should bring a Scire facias since the Execution was delayed for more than a Year; however the Practice is, that if Judgment upon a Warrant of Attorney is not entered within a Year, it shall not be entered afterwards without Leave of the Court.

S H E R I F F. *See* Dissenters, 4.

(1) **T**HE Sheriff is the King's Officer, and therefore is always made and appointed by the King, unless in Counties Palatine.

(2.) He hath Custodiam Comitatus, and therefore hath an Authority to raise the Posse Comitatus to suppress Rebellions, Riots, &c.

(3.) He hath a Jurisdiction both in criminal and civil Cases, and for this Purpose he hath two Courts, (viz.) his Tourn or View for criminal Causes, which is therefore the King's Court, because Pleas of the Crown can be in no other than the King's Courts; the other is his County Court for civil Causes, and this is the Court of the Sheriff himself, and for this Reason 'tis called, the County Court.

Yelv. 45.
Where he
levies the
Goods by a
Fi. fa. he may
sell them,
tho' he is
out of his
Office.

(4.) It was formerly held, that if he take Goods in Execution by Vertue of a *Fi. fa.* and is out of his Office before they are sold, that in such Case he could not sell, and deliver the Money to the Party, because his Authority determined with his Office; but he ought to deliver such Money over to the new Sheriff, as he doth the

the Prisoners, and return, that thereupon a Venditioni exponas may be awarded to the new Sheriff.

(5.) But since it hath been held, that tho' a new Sheriff is made, yet the old Sheriff may sell the Goods so by him levied; but if he return the Writ, that the Goods are in his Hands pro defectu emptorum, in such Case a Distringas shall go to him to deliver them over to the new Sheriff, and after that a Venditioni exponas. 1 Vent. 319.

(6.) Where he levies Money upon a Fieri Facias, the Plaintiff may have an Action of Debt against him for the Money, because it was received by him to the Plaintiff's Use, and the Defendant is discharged of it; and it lies against his Executors, if he die, for this is not like an Escape, which is a Wrong done by the Sheriff himself, but 'tis founded on a Duty due and owing by the Sheriff, which shall survive and charge his Executors. Cro. Cat. 539. Perkinson's Case. Where he levies Money by a Fi. Fa. the Party may have an Action of Debt against him.

(7.) The King appointed a Sheriff, and afterwards a Barony descended on him by the Death of his Father, his Office doth not determine, but he continues Sheriff notwithstanding he is a Baron and Peer of the Realm. 3 Cro. 13. Mordant's Case. His Office doth not determine by the Descent of a Barony.

S I M O N Y.

(1.) **T**HIS is studiosa voluntas emendi vel vendendi spiritualia, vel spiritualibus annexa, and in the following Cases may be seen what is Simony, and what is not.

(2.) In a Special Verdict in Ejectment, the Case was, an Usurpation was made, and a Quare Impedit brought against the Incumbent, and pending that Writ the Plaintiff sold the perpetual Advowson to W. R. and the Jury found, that it was with Intention that H. C. should be presented after the Usurper was removed, and accordingly he was presented, instituted and inducted; the Plaintiff supposing the Presentation to be void, got the King's Title, upon which he was admitted and inducted, and brought his Ejectment against the Defendant, and had Judgment; for per Curiam, the Defendant was in by Simony. 2 Vent. 39. Pending a Quare Impedit, the Plaintiff sold the perpetual Advowson to W. with an Intention that H. should be presented, 'tis Simony.

31 Eliz. c. 6.
2 Lutw. The
King v. Gil-
son.

The Patron
was an In-
fant and a
simoniacal
Agreement
was made
with his Mo-
ther, he (the
Infant) need
not be na-
med in the
Quare Impedi-
dit.

(3.) In a *Quare Impedit*, the Plaintiff set forth the Statute against Simony, and that Thornden was a Benefice with Cure; which being void, a simoniacal Agreement was made with the Mother of the Patron, who was an Infant, and one Crew; that the Infant should present Crew, and that in Consideration thereof he should pay to her 250 l. &c. The Defendant pleaded in Abatement, that he claimed nothing in the Benefice, but upon the Presentation of the Infant W. W. who is not named and made Defendant; and upon a Demurrer to this Plea it was adjudged, that where the Right of the Patron is not to be divested by the Judgment, there he need not be named in the Writ; now in this Case there was no Complaint against the Patron, for it was not he, but the Simonist, who is the Disturber, and therefore he need not be made a Defendant.

(4.) In the last Case the Statute against Simony is recited, but in the following Case 'tis not.

2 Lutw. The
King v. Bi-
shop of Chi-
chester.

Quare Impedit
good, tho'
the Statute
against Si-
mony is not
recited.

¶ In a *Quare Impedit* against the Ordinary, Patron, and Incumbent, to present to the Church, &c. setting forth, that 'tis a Benefice with Cure, &c. and that in 1681, it became void by the Death of the Incumbent, &c. then he sets forth, that during the Avoidance there was a simoniacal Agreement by which the present Incumbent was presented, &c. The Bishop pleads, that he claims nothing but as Ordinary; the Patron demurred to the Declaration, and the Incumbent pleaded, that he was Parson Imparfonee, upon the Presentation of the other Defendant, the Patron, and traversed the simoniacal Agreement; the Plaintiff replied, and prayed Judgment against the Ordinary, and took Issue upon the Traverse of Simony, and joined in Demurrer with the Patron; and it was objected against the Declaration, that the Statute against Simony was not recited therein, for so are all the Precedents: Sed per Curiam, non allocatur.

Sid. 329.
Simony,
where nei-
ther the Pa-
tron or the
Clerk knew
the giving
any Money.

(5) Error to reverse a Judgment in *Quare Impedit*, where the King had recovered upon a simoniacal Agreement, which was, that a Friend of the Clerk should give W. R. so much Money to procure him to be presented, and that he was presented secundum agreementum prædict'; the Error assigned was, that neither the Patron or the Clerk knew any Thing of giving the Money: Sed per Curiam, he was Simoniacæ promotus, for being presented secundum agreementum prædict', is a good Aberrment of a simoniacal Promotion.

3 Lev. 337.
Where the
Incumbent
pleaded, that
voidance to

(6.) In a *Quare Impedit*, the Plaintiff set forth, that he had granted the next Avoidance to B. that the Church became void; he had no Notice of the corrupt Agreement between R. and the Grantee of the next Avoidance to present him.

and then he sets forth the Statute made against Simony, and during the Avoidance a corrupt Agreement was made between one Richards and the Grantee of the next Avoidance, that he should present one Hide, who was presented accordingly, which by Vertue of the Statute was void, &c. the Defendant Hide pleads with a Protestation to the Agreement, and that he had no Notice thereof; and upon a Demurrer to this Plea it was adjudged against the Incumbent Hide, because Notice in this Case is not material, by Reason of the Difficulty of proving it; 'tis the corrupt Agreement which makes the Simony, tho' the Incumbent might have no Notice of it.

(7.) Debt upon Bond, conditioned to resign upon Request; the Defendant pleads, that he did resign according to the Condition of the said Bond, upon which they were at Issue, and the Jury found for the Plaintiff; and upon a Writ of Error brought in B. R. it was assigned for Error, that this Bond was void, because it was made upon a simoniacal Agreement: Sed per Curiam, the Judgment was affirmed.

Raym. 175.
3 Mod. 297.
Sid. 387.
Debt upon
Bond conditioned to resign upon Request, good.

S L A N D E R.

(1.) CASE, &c. for these Words, * Nuttal, who was Solomon Smith's Clerk, is a Knave and a Rogue, and I will prove it, and he is in Newgate for Counterfeiting the King's Hand and Seal, and will be hanged for it, actionable.

In capital Offences actionable.
* Raym. 17.

(2.) Case for these Words, Thou hast stole our Bees (innuendo, a Stock of Bees) and Thou art a Thief; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that Felony cannot be committed of Bees, because they are Feræ Naturæ: Sed per Curiam, the subsequent Words, viz. Thou art a Thief, shew, that the Stealing was of such Bees of which Felony may be committed, and so actionable.

Raym. 33.

(3.) Case, &c. He is a Clipper and a Coiner, after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that the Words did not charge the Plaintiff with Clipping or Coining Money, for they may be applied to many other Things; but adjudged

1 Vent. 172.

judged actionable, for it must be intended, that he meant Clipping of Money, and in that Sense 'tis usually understood.

In capital
Offences not
actionable.
1 Vent. 213.

(4.) Case, &c. He pick'd my Pocket against my Will, he is a Pick-pocket, not actionable, because the Words do not imply, that he was guilty of Felony.

1 Vent. 325.

(5.) Case, He would have given Dean Money to rob Golding's House, and he did rob the House; after a Verdict for the Plaintiff it was insisted in Arrest of Judgment, that the first Part of the Sentence imports only an Inclination to rob, and the subsequent Words are relative to the first, for the Word He must refer to the last Antecedent, which was Dean, so no Charge on the Plaintiff: Sed per Curiam, the Words may be thus construed, that the Plaintiff gave Dean Money to rob the House, and he refusing, the Plaintiff himself robbed the House.

2 Vent. 172.

(6.) Case, &c. for these Words, He broke my House like a Thief; upon Not guilty pleaded, the Plaintiff had a Verdict: Sed per Curiam, in Arrest of Judgment, the Words are not actionable.

Words of
Tradesmen
actionable.
Raym. 62.

(7.) Case for these Words spoken of a Broker, and of his Profession, he is a cheating Knave, he hath cheated me with Brass-Money: Per Curiam, to call a Tradesman a Cheat generally, is not actionable, unless the Words are spoken of his Trade.

Raym. 207.

(8.) Case, &c. brought by a Merchant for these Words, there being a Communication of him, the Defendant said, I believe all is not well with Daniel Vivian, there are many Merchants who have lately failed, and I expect no otherwise of Daniel Vivian, actionable.

Raym. 169.
1 Lev. 250.

(9.) Case, &c. by a Mercer for these Words, Thou art a cheating Knave and a Rogue; after a Verdict for the Plaintiff, the Judgment was stayed, because there was no Colloquium laid of his Trade.

Raym. 184.

(10.) Case, &c. by a Merchant for these Words, Austin Drake is broke, he is a beggarly Fellow, and not worth a Groat, and not able to pay his Debts; after a Verdict for the Plaintiff it was moved, that the Words are not actionable, for he may be an honest Man, and not worth a Groat, and 'tis no Crime to be a beggarly Fellow, for it may be a Misfortune, and no Fault: But per Curiam, to say he is not able to pay his Debts, is actionable.

Raym. 231.

(11.) Case, in which the Plaintiff declared, that he is a Keeper of a Livery-Stable, and of Bell-Savage Inn, and that the

De-

Defendant had other Stables there, and that W. R. coming thither with a Waggon, enquired of the Defendant which was Bell-Savage Inn, who replied, this is Bell-Savage Inn, deal not with Southam (the Plaintiff) for he is broke, and there is neither Entertainment for Man or Horse; after a Verdict for the Plaintiff and great Damages, the Judgment was affirmed.

(12.) Case, &c. in which the Plaintiff declared, that there being a Communication of his Trade, the Defendant said He is a cheating Knave, and keeps a false Book, with which he hath cheated the Country, actionable, for tho' cheating Knave is not actionable, tho' a Colloquium was laid of his Trade, yet 'tis actionable to say he keeps false Books, for Tradesmen's Books are often given in Evidence, therefore they must not be false. ^{1 Vent. 263.}

(13.) Case, &c. by a Draper for these Words, you are a cheating Fellow, and keep a false Book; the Plaintiff had a Judgment, but it was set aside, because he had not alledged any Colloquium of his Trade, for to say a Man is a cheating Fellow, it doth not follow that he is so in his Trade, for he may cheat at Gaming, and the Words being general, may as well be applied to that as to his Trade; and to keep a false Book, doth not imply that he kept a false Debt-Book, for he might keep a Book which is false printed. ^{Words spoke of Tradesmen not actionable. 2 Saund. 307.}

(14.) Case, &c. for these Words spoken of a Distiller, wherein the Plaintiff declared, that he, discoursing with one Mles, asked him of whom he bought Aqua Vitæ, who replied of Mr. Godfrey (the Plaintiff) then the Defendant said, He is a Varlet, he hath suppressed his Brother's Will to cozen and deceive Men of their Legacies, I will make him cry Peccavi on his Knees, &c. not actionable, because these Words do not relate to his Trade. ^{Palm. 21.}

(15.) Case, &c. for these Words spoken of a Merchant, You are a Cheating Rogue, and a Runagate Rogue; after a Verdict for the Plaintiff, it was adjudged not actionable; for to say generally, that a Man is a Cheater, is not actionable, unless there is a Colloquium of his Trade or Profession, which was not done in this Case. ^{Hardr. 8. 2 Lev. 214.}

(16.) Case for these Words spoken of a Watch-maker, He is a Bungler, and knows not how to make a good Piece of Work; after a Verdict for the Plaintiff, adjudged not actionable, because the Words are indifferent, and have no Relation to his Trade; 'tis true, in this Case the Jury found that the Plaintiff was a Watch-maker; and if the Words had been, he knows not how to make a good Watch, it had been actionable. ^{1 Mod. 19.}

(17.) Case,

2 Lev. 233. (17.) Case, &c. for saying, that she is as much a Man as I am, she is an Hermaphrodite, spoken of a Woman who taught Girls to dance, not actionable; for 'tis no Scandal to her Profession to say, that she is an Hermaphrodite, because Men usually teach young Women to dance.

Words spoke
of Men of
Professions
actionable.
2 Vent. 28.
1 Saund. 231. (18.) Case, &c. in which the Plaintiff declared, that he was bred to the Law, and practised it, and that the Defendant wrote a Letter to A. C. his Client, that he (the Plaintiff) would give vexatious and ill Counsel, and stir up a Suit, and would milk her Purse and fill his own large Pockets; actionable by 3 Judges, contra Vaughan Ch. Just.

2 Vent. 172. (19.) Case against an Attorney for these Words, He is a Cheating Knave, and not fit to be an Attorney; actionable, because saying, he was not fit to be an Attorney, shews that the preceding Words, (viz.) Cheating Knave, must necessarily refer to his Profession as an Attorney.

Raym. 196. (20.) Case by an Attorney, in which he laid a Colloquium of his Profession, and of him, and that the Defendant said in the Hearing of several People, Thou canst not read a Declaration, by Reason whereof T. P. and W. R. who were formerly his Clients, deserted him: Upon Not guilty pleaded the Plaintiff had a Verdict, and upon a Motion in Arrest of Judgment, the Words were held actionable.

Words of
Men of Pro-
fessions not
actionable.
Palm. 441.
Poph. 177.
Latch 20. (21.) Case, &c. for these Words spoken of an Attorney of B. R. You are a Knave on Record, and a Forgery Knave; not actionable, as reported by Palmer.

1 Lev. 250.
Raym. 182. (22.) Case, &c. In which the Plaintiff declared, that he is a Mercer, and that the Defendant spoke these Words, Thou art a Cheating Knave, and a Rogue; after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that here was no Colloquium laid of his Trade, and for this Reason the Judgment was set aside. In antient Times it was the constant Course to lay a * Colloquium in Declarations for Words, and it was a Doubt whether it was good without it, till the Case of Smith and Ward in 2 Cro. but since that Case it hath been held sufficient to alledge, that the Words were spoken de querente and de arte sua, which Allegation shall supply the Colloquium.

* Raym. 86.

S T A T U T E.

(1.) **I**nformation for importing twenty Pottacos of Tobacco in a Vessel not belonging to the People of this Nation contra formam Statuti; after a Verdict for the Informer, the Judgment was set aside, because by the Statute the Goods must belong to the People of this Nation, and 'tis not averred that the Tobacco thus imported did belong to the People of this Nation, for 'tis that which makes the Forfeiture, and 'tis none if imported in a Foreign Vessel, and by Foreigners; and the Conclusion contra formam Statuti will not help in this Case, because the Omission is in the most material Part of the Statute which creates the Offence, and which ought to be strictly pursued.

Hardr. 20.
Where there
is an Omis-
sion in the
most mate-
rial Part of a
Statute, the
Conclusion
*contra formam
Statuti*, will
not help.
Postea 11 S.P.

(2.) The Defendant was indicted for selling Ale in black Pots not marked, and this Indictment did not conclude contra formam Statuti. Sed per Curiam, 'tis good without such Conclusion, because the Common Law appoints, that all Measures should be just; therefore to sell less than Measure, is an Offence at Common Law, and this Circumstance of Marking the Measure is only added by the Statute.

1 Vent. 13.
Sid. 409.
Where the
Omission of
*contra formam
Statuti* will
not hurt.

(3.) Information for a Riot, and concluded, contra formam Statuti 13 H. 4. after a Verdict for the Informer, it was moved in Arrest of Judgment, that the Information was ill, because it concluded contra formam Statuti, whereas the Statute doth not make the Offence, but appoints Justices of the Peace, upon Complaint that there is a Riot, to view and record the same, and in what Manner to punish the Rioters. Hale Ch. Just. of Opinion, that this being an Offence at Common Law, and mentioned in this Statute, therefore the Information was well concluded contra formam Statuti; but the other Judges were against him.

1 Vent. 43.
Where the
Conclusion
*contra formam
Statuti*, will
hurt.

(4.) Adjudged, that where an Offence is created by a Statute, which was not an Offence at Common Law, and if that Statute gives an Action to the Prosecutor, in such Case he must shew in his Declaration, that the Defendant is within all the Qualifications and Descriptions of that Statute, otherwise the Action will not lie; but where the Penalty is given to the King, 'tis sufficient to say contra formam Statuti.

Sid. 303.
Where an
Offence is
made by a
Statute, and a
Punishment
or Action gi-
ven to the
Prosecutor,
he must bring
himself with-
in the Qua-
lifications of
the Act.

Platt *versus* Hill. Mich. 10 Will. III.

Where the Defendant will take Advantage of a Misrecital, he must not demur, but plead *Nul tiel Record*. See *Postea* 3. *contra*.

(5.) **P**ER Holt Ch. Just. Where the Plaintiff misrecites a Private Act of Parliament, and the Defendant demurs to the Declaration, Judgment shall be given for the Plaintiff, for it shall be taken to be as 'tis pleaded, because by the Demurrer 'tis confessed to be so; therefore, if the Defendant will take Advantage of a Misrecital of an Act of Parliament, he must plead *Nul tiel Record*, or alledge, that 'tis farther enacted so and so, &c.

Flower *versus* Parker. Mich. 5 Annæ.

Justices, &c. have no Authority, if the Defendant was not in Custody such a Day.

(6.) **T**HE Defendant was taken by Process of the Court of B. R. and now prayed the Benefit of being discharged upon Common Bail, according to the Statute for Discharging poor Prisoners, shewing the Certificate of the Gaoler, and the Adjudication of the Justices. Et per Curiam, the Justices have no Authority, unless the Defendant was actually in Custody on such a Day; for a bare Being within the Rules will not be sufficient, and this Court will examine the Truth of it, notwithstanding this Certificate and Adjudication.

Winter *versus* Price. Mich. 5 Annæ B. R.

Justices cannot discharge a Prisoner, if he owes more than 100 l. to one Man.

(7.) **T**HE Defendant Price being indebted to Winter in a Bond of 180 l. conditioned to pay 90 l. and Interest on such a Day, was arrested, and discharged by the Justices, upon the Statute of Poor Prisoners, upon Common Bail. Sed per Curiam, There being 20 l. due for Interest at the Time that Statute was made, by Consequence he owed at that Time more than 100 l. and therefore the Justices could not lawfully discharge him; so their Order was made void.

* *Antea* 5. Where a Man misrecites a general Statute, the other Side must demur, but not if he misrecites a private Statute.

(8.) In Platt and Hill's Case before mentioned, it was held, per Holt Ch. Just. That if a Man misrecites a General Statute, the other Side cannot plead *Nul tiel Record*, but must demur; and then if the Misrecital was of Substance, and the Party upon reciting it concludes *Vigore Statuti pred'*, or *contra formam Statuti pred'*, 'tis naught; but if he conclude *contra formam Statut' in hujusmodi casu edit'*, or the like, 'tis good.

(9.) 'Tis a safe Way in Pleading to set out, that a Parliament was held generally in such a Year of the King, without descending to Particulars, as to the Day and Month; as for Instance, *Actio non quia dicit quod in Statuto in Parlamento Domini Willielmi nuper Regis Angliæ tertii apud Westm' Anno Regni sui nono tent' edit' inter alia Ordinatum fuit autoritate ejusdem quod, &c.*

1 Saund. 5.
The Form of
Pleading a
Statute.

Mills versus Wilkins. Mich. 2 Annæ.

(10.) **I**N Trespass for taking several Skins; the Defendant justified under the Statute 1 Jac. 1. cap. 12. intituled an Act, &c. but mistook one Word in the Title; and upon a Demurrer to this Plea it was urged, that the Title is no Part of the Act, and that by the Opinion of *Hale Ch. Baron, an Act of Parliament may be good without a Title: Sed per Holt Ch. Just. tho' the Title is no Part of the Act, no more than the Preamble, or the Title of a Book is Part of a Book; yet where the Justification is tied to the Act described, and if there is no such Act the Justification must be ill; 'tis true, in Pleading 'tis not necessary to set forth the Title of the Act, for 'tis sufficient generally to say, *quod inactitatum fuit*; but if a Title is set forth, 'tis better to do it in Latin than in English, Judgment was given for the Plaintiff.

2 Salk. 609.
Where the
Mistake was
in the Title
of the Act
recited.
* Hardr. 324.

(11.) Information on the Statute 35 H. 8. cap. 17. for grubbing up Wood *contra formam Statuti*, &c. after a Verdict for the Plaintiff it was objected in Arrest of Judgment, that this Information was not good, because it did not set forth, that the Wood was growing at the Time of the Act made; as upon the Statute 5 Eliz. for exercising a Trade, not being an Apprentice to it for seven Years; it must be alledged, that it was a Trade used at the Time of that Act made, and for this Reason the Judgment was set aside; 'tis true, this Information concludes *contra formam Statuti*, but that will not help, because those Words are no Part of the Case, they are only a Conclusion upon the Premises insufficiently set forth.

Hard. 105.
Where the
Conclusion
contra formam
Statuti will
not help.
Antea 1. S. P.

Suit of Court and Services.

Of Suit Real
and Suit Ser-
vice.

(1.) **T**here are two Sorts of Suits, (viz.) Suit Real and Suit Service; the first is by Common Law and of Common Right, for 'tis that Attendance which Men owe to Tourns and to County Courts, and the Law obliges them to this Service, in respect of their Commorancy, that there may be no Want of Jurors to do the Business of those Courts; therefore he who makes Default and doth not appear there, is to be amerced; the Nobility are excused by the Statute of Marlbridge, cap. 10. now by the Statute of Merton, cap. 10. a Man may do this Suit by Attorney; but if the Sheriff's Tourn is held out of the Hundred where the Party lives, then, in such Case he is excused by the Statute of Marlbridge aforesaid.

Suit Service
is due by Re-
servation.

(2.) Suit Service is in respect of the Tenure, and 'tis due by Reservation, therefore, for this as well as for all other Services by which Lands are held, the Lord may distrain, if there is a Default in the Tenant; and as Suit Real is due to such Courts which are of publick Institution, (viz.) to the County Courts and Tourns, so this Suit Service is due to the Courts of private Persons, as to Courts-Baron of particular Lords of Manors; and tho' the Suitors are Judges, yet they may do their Services by Attorney.

2 Lutw. 1366.

(3.) In Trespass, the Defendant pleads, that his Father being seised of certain Lands, demised them by Indenture to A. habendum to him and to his Executors and Assigns for ninety-nine Years, if the said A. and B. should so long live; reddendum, after the Death of the said A. and B. his or their best Beast, or 40s. in Lieu thereof: *Proviso*, that no Heriot shall be paid upon the Death of B. living A. then A. died, and afterwards B. died, whereupon the Plaintiff having the Reversion by Descent, distrained a Gelding; but in the Pleading it did not appear, that the Distress was taken on the Premises: *Et per Curiam*, this is a Heriot Service, being reserved upon a Lease, and in that Case, there being a Reversion, this is a Service incident to it, and therefore must be reserved payable during the Term; but where a Tenant in Fee holds of his Lord by Heriot Service, such Service is incident to the Tenure, which is antient, and must be supposed to be before the Statute *Quia emptores*, &c. and these are seisable by the Lord, either on, or out of the Lands; but

but this being a Periot Service by Reservation, and not due till post mortem. A. there can be no Reversion when it became due.

SUPERSEDEAS.

(1.) **W**here a Writ of Error is returnable in Parliament Teste after the Prorogation, and a whole Term intervene between the Teste and Return, 'tis no Superseas; but 'tis otherwise if a less Time intervene, or if the Writ of Error be returned before the Prorogation.

1 Vent. 266.
Where a Writ of Error in Parliament is no Superseas.

(2.) Writ of Error upon a Judgment in B. R. taken out, and Teste 1 Novemb. returnable 1 November prox, and a Mittimus endorsed on the Roll in B. R. it was held, that the Record still remained in B. R. to all Purposes, and that Execution might be taken out, for the Writ of Error was no Superseas.

Ibidem.

(3.) Writ of Error in the Exchequer-Chamber, upon a Judgment in B. R. and Error in Fact assigned, which not being assignable there, that Court affirmed the Judgment of B. R. and the Record of Affirmation being transmitted into B. R. the Plaintiff brought another Writ of Error there coram vobis residen, and moved, that upon putting in Bail it might be a Superseas to the Execution: Sed per Curiam, it was not allowed, because the Judgment being affirmed in the Exchequer-Chamber, transit in rem judicatam.

1 Vent. 107.
2 Lev. 38.
Writ of Error coram vobis residen' is no Superseas.

(4.) Judgment against W. R. in B. R. and a Writ of Error brought in the Exchequer-Chamber; afterwards the Plaintiff brought an Action of Debt on that Judgment, and the Defendant pleaded Nul tiel Record; and upon a Demurrer this was adjudged an ill Plea, because the Writ of Error is no Superseas to the Action of Debt on the Judgment, but only to the Execution upon that Judgment; besides, the Record is not removed by the Writ of Error, but only the Transcript.

Sid. 236.
Raym. 100.
1 Lev. 153.
1 Vent. 34.
Writ of Error in the Exchequer-Chamber is no Superseas to an Action of Debt on a Judgment in B. R.

(5.) Adjudged, that where a Writ of Error is not shewn to the other Party, or allowed by the Clerk, by his endorsing Receipt upon it within four Days (which is allowed as a convenient Time for putting in Bail, according to the Statute) 'tis no Superseas;

1 Vent. 255.
Where a Writ of Error is no Superseas.

persedeas; likewise, if before the Writ of Error allowed, the Sheriff returns Fieri Feci, or Non inveni emptores, that in such Case the Execution shall not be set aside.

Superstitious Use.

* 1 Ed. 6.
cap. 14.

(1.) **A**LL Superstitious Uses are void, and given to the King by the Statute of * Ed. 6. which extends only to such Uses as were made before that Time, so that all Superstitious Uses since that Statute was made, tho' they are void, yet they are not forfeited to the King.

1 Rep. Por-
ter's Case.

43 Eliz.
cap. 4.
23 H. 8.
cap. 10.

(2.) Whatever Use is devised or given to any Person or Company, and which is not a charitable or good Use in the Eye of the Common Law, or within the Statute 43 Eliz. seems to be a void Use, and of no Effect within the Statute 23 H. 8.

The King and Queen versus Portington & al'.
Mich. 4 Will. III. B. R.

1 Salk. 162.
Where an
Averment
will not be
allowed to
defeat a Will.

(3.) **I**N Ejectment by the Heir at Law against the Devisee, the Case upon Evidence was, that the Defendants were Roman Catholics, and that one of them did recommend such a Priest to be Confessor to the Testatrix, who persuaded her she could not be saved, unless she devised her Estate to God and his Saints, and that the Defendant was an Abbeys in France, and joining with the Confessor in the same delusive Persuasions, prevailed with the Testatrix to devise her Estate to her, and this was urged to be Evidence of a Superstitious Use; but the Court was of Opinion, that this being an absolute Devise, and no Trust declared or appearing upon the Face of the Will it self, no such Averment could be made or admitted, for if the Law will not allow an Averment to supply a Will, a fortiori, there can be none to defeat it: Et per Holt Ch. Just. The Stat. 23 H. 8. makes such Uses void, but doth not give them to the King, and the Statute 1 Ed. 6. gives them to the King, but doth not extend to future Uses made after that Statute; and that it might be convenient for the Heir at Law to seek his Remedy in Parliament, according to the Case in Moor 784. quod vide.

I.

(4) Feoff-

(4.) Feoffment to the Use of his Last Will, then the Testator devised his Lands to the Dean of Newark for an obit, and the Residue to pay a Chantry Priest 7 l. per Annum during the Life of his Wife, and of his Sister Edith, to chant for his Soul, &c. and after the Death of his Wife and Sister, then to perform Divine Service for 99 Years, and afterwards to be sold, and the Money to be distributed to charitable Uses for the aforesaid Souls. The Feoffees made a Feoffment accordingly for 99 Years, rendering 7 l. per Annum to the Chantry Priest; then came the Statute 1 Ed. 6. concerning Chantries, and the Question was, whether the Fee-simple or the Lease only was forfeited to the King? Et per Curiam, The Fee-simple is forfeited; for by the first Feoffment and the Will all was limited to Superstitious Uses.

² Sid 13, 34, 46.
Where a Limitation is to a Superstitious Use.

T A I L.

Of Estates-tail, and of Leases, &c.
made by Tenants in Tail.

Simonds *versus* Cudmore. Hill. 1 Will. III.
Rot. 743.

(1.) **T**HIS Case is reported in * 1 Salk. but more clearly here, (viz.) A. was Tenant for ten Years in Possession; the Remainder was to B. in Tail, who had likewise the Reversion in Fee expectant, upon the Determination of the Lease for ten Years, and being seised of both these Estates, he made a Lease for Years to commence at a Day to come; but before that Day came he died; then the Issue in Tail levied a Fine, and declared the Uses thereof to himself and his Heirs; the Lease for ten Years expired, and then the Future Lessee entered, and was in Possession by Virtue of the Lease made to him by the Tenant in Tail

* 1 Salk. 338.
Where a Lease made by the Tenant in Tail, shall bind the Issue.

Tail, upon whom the Issue in Tail entered, and the Question was, whether he was bound by this Future Lease.

In arguing this Case it was held, that where Tenant in Tail makes a Lease to commence in presenti, 'tis voidable by his Death; but if he makes it to commence in futuro (as in this Case he had done) (viz.) If it be to commence after his Death, 'tis void, because 'tis not derived out of his own Estate and Possession, but out of the Estate of the Issue in Tail, which is paramount per formam doni; so if Tenant in Tail makes a Lease to commence at a Day to come, and dies before the Day come, the Lease is void, and the Lessee is a Trespasser if he enter, because the Lessee had no Estate or Interest in the Land, but only an Interesse Termini till actual Entry, and the Issue in Tail had a Title paramount and precedent to that of the Lessee, which cannot be avoided. But per Curiam, in the Principal Case the Lease is not void but voidable by the Issue in Tail, and that only in Respect of the Estate-tail; and therefore since this Lease issued out of all the Interest and Estates which the Lessor had, (viz.) as well out of the Reversion in Fee, as the Estate-tail, and since the Estate-tail is now extinguished by this Fine, which hath now turned all into an entire Fee-simple, it hath thereby made the Estate unavoidably subject to this Lease.

Lord Ossulston's Case. Mich. 7 Annæ.

Devise of a
Remainder
to his Right
Heirs Male
must be in-
tended Right
Heirs Males
of his Body.

(2) **F**ord being seised in Fee, and having Issue three Sons and a Daughter, and having likewise one Brother, devised his Lands to his eldest Son in Tail Male, and so the Second and Third Son, Remainder to his own Right Heirs Male for ever; the three Sons died without Issue, and the Question was, whether the Daughter, as Heir General, or the Brother of the Testator, as Heir Male, should have the Lands. Et per Curiam, none shall take by those Words Heirs Males, but he who is Heir Male of the Body of the Testator, for no collateral Heir Male shall take by such a Limitation by way of Remainder; for at Common Law, if Land was given by a common Conveyance to one and his Heirs Males, there the Word Males shall be rejected, for there was no such Thing as an Heir Male, without saying of whose Body; and if by Letters Patents Lands were limited to W. R. and his Heirs Male, 'tis void, tho' 'tis otherwise in a Will; and the Reason is, because in a Will the Law supplies those Words, of his Body, and that makes it a Devise to him and the Heirs Males of his Body, for Heirs or Heir Male cannot be a Name of Purchase, but Heirs Males of his Body may: Therefore, if there is no such Thing in Propriety of Speech as

an Heir Male, without saying of whose Body, for that Reason Heir Male of his Body, or Heirs Males of it self, where the Law will supply these Words, of his Body, as it will in a Devis, may be a good Name of Purchase; but yet the Party who would take by such a Limitation must be such a Person as may be an Heir by the Common Law, and would take by that Name.

See *Cowden v. Clerke*, and *Pilus v. Milford*.

Lee versus Brace. Mich. 8 Will. III. B. R.

(3.) **A** Feoffment was made to the Use of the Feoffor for Life, Remainder to W. R. his Son and his Heirs, and for Want of Issue of him, then to the Right Heirs of the Feoffor: Mr. Northey objected, that tho' this would have been an Estate-tail in W. R. by a Will, yet the Authorities which prove it to be so, do likewise prove, that it would be otherwise in a Deed, as in this Case. Sed per Holt Ch. Just. non allocatur, for this is but one entire Sentence of Limitation, the Intent whereof is very plain, and the Rule of Law is only, that an Estate of Inheritance cannot pass without Words of Inheritance; but there is no Rule in Law, that Words of Inheritance may not be qualified or abridged by subsequent Words; therefore in this Case W. R. hath only an Estate-tail, tho' by Deed, it being in one Sentence; for tho' the first Words of that Sentence, (viz.) to his Son and his Heirs, make a Fee-simple, yet the subsequent Words, (viz.) and for Want of Issue of him, make an Estate-tail, by qualifying and abridging the first Words, and in creating Entails, voluntas donatoris observanda est.

Feoffment to the Use of his Son and his Heirs, and for Want of Issue of him, Remainder over is an Estate-tail.

(4.) In a Special Verdict in Ejectment, the Case was; the Father being seised in Fee, had Issue Robert by the first Mother, and Ralph and Jane by the second Mother, and he covenanted to stand seised to the Use of himself for Life, Remainder to Trustees to several Purposes, Remainder to Jane for Life, Remainder to Ralph, and the Heirs Males of his Body, and of his Lands in W. (being the Lands now in Question) to the Use of his Heirs Males begotten on the Body of his second Wife; the Father died, and the Question was, whether by this Limitation any Use did arise to Ralph, who was his Heir Male by the second Wife? and adjudged that it did, because his Father had an Estate for Life in these Lands in W. not by express Limitation, but by Operation of Law, which being united to the Estate limited to the Heirs Males of his Body, makes an Estate-tail; now this being in a Covenant to stand seised, and no Transmutation of Possession, (as it was in *Greswold's Case*) so much of the old Use which was not disposed by the Covenantor, still remains in him, for there is nothing to take it out of him, (and so is *Cowden and Clerk's Case*,

2 Lev. 75.
Raym. 228,
159. 273.
2 Mod. 207.
1 Mod. 121,
159.
Sid. 98.
Where an Estate for Life shall be raised by Implication, and united to a Limitation of the Lands to the Use of his Heirs Males begotten of his Body, so as to make an Estate-tail executed in himself.

and Bingham's Case) so that the old Use being still in the Father, who was the Covenantor, this Estate for Life shall be raised in him by Implication of Law, to preserve and support this Limitation, (viz.) To the Heirs Males of his Body, so that this is an Estate-tail executed in him, and by Consequence after his Death it shall be to Ralph, his Son, as a contingent Remainder.

Raym. 127.
Where an
Estate-tail is
executed,
and where
the Remain-
der is not
contingent.

(5.) By a Marriage Settlement and Fine levied, &c. to the Use of Husband and Wife, for their joint lives, Remainder to the Heirs of the Body of the Wife by the Husband to be begotten, Remainder, (the Wife surviving the Husband) to her for Life, Remainder to the Right Heirs of the Husband; per Curiam, this is an Estate-tail executed in the Wife, it cannot be a contingent Remainder, because that never is but in Cases where the particular Estate may determine before the Contingency happens.

T A L E S.

Cook's Trial. fol. 12, 13, 14, 15.

Where the
Jury is sum-
moned to try
a Particular
Issue, there
may be a
Tales, where
not.

(1.) **A**T the Sessions of Gaol-Delivery for the Trial of Cook for High Treason, the Court could not have a full Jury by Reason of Defaulters, and the many challenged by the Prisoner, whereupon the Court adjourned to another Day, and ordered another Panel to be then ready; it was objected, that there ought to be a *Tales*, and an Habeas Corpora, to compleat the Number of nine Jurors, who were already sworn, for otherwise this Record would be left imperfect. Et per Curiam, Wherever the Jury is summoned by a Venire facias to try a particular Issue, there may be a *Tales*, because there is a Writ upon which it may be grounded; but where there is no Venire facias 'tis otherwise; for there can be no *Tales* but with an Habeas Corpora to bring in the first Jurors: Therefore in the Case of Oyer and Terminer, tho' perhaps there may be such a Course, yet in Commissions of Gaol-Delivery it cannot be; and 'tis very plain that 'tis not necessary; for in such Cases the Course is for the Justices before

before they come to Court, to send a written Precept to the Sheriff generally, to return Jurors against their Coming, in order to deliver the Gaol; and out of those Panels the Jury is called, and without any Writ or Precept in Writing, and the Entry is no more than thus, (viz.) that W. R. the Prisoner, pleaded Not guilty, Ideo immediate veniat inde Jurata, and this is always before Issue joined, and therefore 'tis never to try a particular Issue; and in this respect the Proceedings of Oyer and Terminer differ, that they do not send a general Precept to the Sheriff before Issue joined, but a particular Precept after Issue joined, to summon a Jury to try a particular Issue, so that this is a Precept in Nature of a Venire facias, upon which Accompt, perhaps a Tales may be grantable: But here it is otherwise, because there is neither a particular Venire facias, or Precept in the Nature of one.

(2.) A Tales is never awarded upon an Indictment, unless by Warrant from the Attorney-General, but 'tis awarded upon an Information qui tam, &c. because of the Interest which the Prosecutor hath in such Prosecutions.

1 Lev. 223.
A Tales is never awarded on an Indictment, unless there is a Warrant from the Attorney General.

T A X E S.

(1.) **T**HE grand Custom of a Mark and Demi-mark on Woolfels and Leather, and also Prisage, (i. e.) one Tun of Wine before the Mast, and one Tun behind the Mast of every tenth Tun, were due to the King by Common Law, and these are implied by the Words * rectæ & antiquæ consuetudines * in Magna Charta, but Petty Customs, or parvæ Custumæ, begun Anno * 31 Ed. 1. and were made perpetual by 27 Ed. 3. cap. 26.

Grand Customs.

* Cap. 30.

(2.) Tonnage and Poundage is by an Act of Parliament, and was never granted for any longer Time than for one or two Years, till the 31 Hen. 6. when it was granted to that King for Life; and not only for the ordinary Defence of the Sea, but that the King might have a Stock of Money always ready for that Purpose, &c.

Tonnage and Poundage.

Brewster *versus* Kidgell. Hill. 9 Will. III. B. R.

1 Salk. 198.
Of Taxes,
Subsidies,
and Assess-
ments.

(3.) **T**HIS Case is reported in 1 Salk. but more clearly, and yet more at large, as followeth, (viz.) It was a feigned Action upon a Wager, in which the Question was, whether the Plaintiff might deduct 4s. in the Pound, being so much charged on the Lands by the Statute 4 & 5 Will. 3. and Power given to deduct it, with a Proviso not to alter any Covenants or Agreements between the Parties.

The Jury found, that R. Langford being seised in Fee of these Lands, did, in the Year 1649, grant a Rent-charge of 40 l. per Annum, issuing out of the same to the Grantee and her Heirs, and on the Back of this Deed there was this Memorandum indorsed, (viz.) That it is the true Intent and Meaning of these Presents, that the Grantee and her Heirs should be paid the said Rent-charge, without Deduction for any Taxes for the Rent or Lands therewith charged; and afterwards by another Deed he covenanted to pay it, free from all Taxes: Et per Holt Ch. Just.

The Word Taxes generally spoken, with Reference to any Freehold, or where the Subject Matter will bear such Reference, shall be intended * Parliamentary, and this propter excellentiam; but there are other Taxes not Parliamentary, such as are for repairing Churches, Taxes imposed by Commissioners of Sewers; and generally, any † Imposition which takes away Part of a Man's Goods or Rent, may properly be called a Tax.

The antient Way of Taxing was by Tenths and Fifteenths, then by Subsidies, afterwards by Royal Aids, and at last by a Pound Rate, the former were all upon the Person and the personal Estate, and were much the same, but the last was upon Lands and Rents.

Anno 18 Ed. 3. a Valuation was made of all the Towns in England, and returned into the Exchequer, and this became the standing Rule for Taxing every Town, (viz.) when a Tax was given, the Officers of the Exchequer presently knew to how much it amounted for every Town, and the Inhabitants taxed the Landholders and Occupiers of Lands, and they were charged and paid their Proportion, tho' they held at a Rack-Rent.

The first Subsidy was granted Anno * 32 H. 8. and this was a Tax upon the Person, both for his Lands and Goods, and payable by him where he lived, and this continued till the 15th Year of Car. 1.

About two Years afterwards, (viz.) Anno 17 Car. 1. the first Assessment was made upon Lands and Rent, according to a Pound-Rate; and by this and other Statutes there was a Clause for the Tenant to deduct the Taxes, and so it was in the Years

* 34 H. 8.
Quinzefme
9.

† 2 Inst. 532.

11 H. 4. 35,
36.
Br. Quin-
zefme 9.

* Cap. 50.

1642, 1644, 1659, and when by the Agreement of the Parties the Taxes were not to be deducted, there was usually a Clause in all Deeds for that Purpose, as it was in this Deed, and at that Time that there should be no Deduction for Taxes; so that if this Covenant or Memorandum had been made in the Year 1640, it would not have extended to those Taxes, because there were no such then in Being or known in the Law, and therefore could not have been foreseen by the Grantor, without a prophetic Spirit; but being frequent and in Use when this Deed was made, he must intend that the Rent-charge should be free from these Taxes, otherwise he intended nothing by this Memorandum and the other Deed.

(4.) The Defendants were indicted for a Misdemeanor, for that being Assessors and Collectors of the publick Taxes in such a Parish, they assessed some too high, and omitted others, and yet they levied the Money on those who were omitted, and converted it to their own Use, for that their Names were not set down in their Books; and being convicted, and coming now to receive Judgment, it was moved, that no corporal Punishment might be inflicted on them, because the Crime was not of an infamous Nature: Sed per Curiam, they were adjudged to the Pillory in the County where the Crime was committed, and that the Marshal should carry them down and a Writ should go to the Sheriff to assist him in the Execution of this Sentence.

Mod. Cases
306.
Assessors of
Taxes in-
dicted for a
Misdemeanor.

T E N D E R.

(1.) **W**here a Tender and Refusal is pleaded, 'tis the Refusal which is traversable, and not the Tender; for 'tis that makes it a Payment in Law and not the Tender; and wherever the Demand is certain, or a certain Sum claimed in the Declaration, there a Tender and Refusal is a good Plea, and a Tender is not well pleaded without a Refusal.

Sid. 13.
Refusal,
where tra-
versable.
Sid. 364.
2 Vent. 109.

(2.) Debt upon Bond conditioned to pay 12l. on the 15th of Aug. and on the 15th of Feb. by equal Portions; the Defendant pleaded, that on the 15th of August there was 6l. due, which on that very Day at B. obtulit solvere, and was ever after

2 Vent. 107.
Where a
Tender is
pleaded
without a
Refusal to

accept, 'tis not good, unless a certain Place of Payment is ready

ready to pay; and afterwards, (viz.) on the 15th Day of December, he did pay it to the Plaintiff, who accepted it; and upon a Demurrer to this Plea it was adjudged ill, because the Defendant pleaded a Tender without a Refusal to accept, and his accepting it afterwards will not help; 'tis true, if there had been a certain Place of Payment mentioned in the Condition of this Bond, and the Defendant had shewed that the Plaintiff was not there ready to receive it, this might be good, but here was no certain Place appointed.

2 Lev. 209.
Where the
Time and
Place is cer-
tain, *semper*
paratus is not
a good Plea,
without al-
ledging *obtu-*
lit se solvere.

(3.) In Debt for Rent, the Defendant pleaded in Bar, that he *paratus fuit* at the Day and Place, &c. to pay it, and that ever since he hath been ready, & profert hic in Curia the Rent, and so petit *judicium de damnis*; and upon Demurrer to this Plea it was objected, that it was ill, because the Time and Place of Payment being certain, 'tis not good to say *semper paratus fuit*, without alledging, that *obtulit se solvere*, and adjudged accordingly.

Raym. 418.
Where *sem-*
per paratus is
a good Plea
without a
Tender.

(4.) Debt for Rent, the Defendant pleaded, that he was at the House on the Day, &c. for an hour before Sun-set, and stayed there on the same Day till Sun-set, ready to pay the Rent, and that no Body was there to receive it; and that since that Day he always was, and yet is ready to pay the same, & *denarios illos idem defendens hic in Curia profert parat' fore solvend' eidem* (the Plaintiff) *si illos de eodem* (the Defendant) *accipere velit & hoc*, &c. And upon a Demurrer to this Plea it was objected, that the Defendant did not plead a Tender at the Day, but only that he was then ready to pay the Rent: Sed per Curiam, the Plea is good without a Tender, but it had not been so in an Action of Debt on a Bond, for there a Tender must be set forth to save the Breach of the Condition.

Lancashire *versus* Killingworth. Trin. 13 Will. III.
B. R.

2 Salk. 623.
Where the
Place and
Time are
certain, it
must be set
forth in the
Pleading at
what Time
he came, and
how long he
stayed.

(5.) There is a short Note of this Case reported in 2 Salk. by the Name of Lancashire *versus* Killegrew, but the Case was thus: *fi.* In Covenant, the Plaintiff declared, that the Defendant's Testator covenanted with the Plaintiff, upon two Days Notice, at any Time within one Year, to accept 1000 l. joint Stock of the Hudson's Bay Company, at the Hudson's Bay House; and that upon the Transfer thereof he would pay the Plaintiff 2000 l. the Plaintiff avers, that on the second Day of November, &c. he gave Notice to the Defendant to come on the fourth

fourth Day of November, (which was within the Year) to the Hudson's-Bay House, and then and there to accept the Transfer of 1000 l. Stock, and that the Plaintiff was ready there, and offered to transfer it, but the Defendant did not accept it, neither had he paid the 2000 l. Upon a Demurrer to this Declaration, Holt Ch. Just. held, that if the Tender had been well set forth, the Plaintiff would have a good Title to the 2000 l. for if he hath done all which he can do, in order to accomplish what he had agreed to do, 'tis as effectual and sufficient as if he had actually transferred the Stock. But here the Tender is not well pleaded; for where 'tis pleaded at the Place appointed, as in this Case it was at the Hudson's-Bay House, and no one there to accept the Transfer, he ought to shew, at what Time he was there on that Day, and how long he staid, for he ought to shew that he had done his utmost Endeavour to accomplish his * Agreement; * Yelv. 38. 'tis true, he need not set forth, that neither the Defendant, nor any Body else in his Behalf, was there, because it shall not be intended, that another was there for him; but if the Truth was so, it must be set forth on the other Side: Now as to the Time, 'tis the last Time of the Day which the Law appoints for a Tender, but yet not so late in the Day, but that there may be Time enough for the Execution of the Agreement in what is tendered: Now in the Principal Case, the Stock can never be transferred, but when the Company's House is open, and that is usually at set Hours, as at ten of the Clock in the Morning; therefore the Plaintiff should have set forth and averred the Usage of the Company, and that he came at the proper Time, and staid there till after the House was shut.

3 Cro. 754.
Yelv. 38.

Giles *versus* Hart. Mich. 9 Will. III,

(6.) **T**HIS Case is reported in 2 Salk. (which see there) to which may be added the Opinion of the Chief Justice Holt in this Case, (viz.) In an Indebitatus Assumpsit for Wares sold and delivered; the Defendant pleaded a Tender on such a Day, and that he hath been ready ever since to pay, &c. and upon Demurrer to this Plea he held, that where an Action of Debt is brought upon a Bond conditioned to pay a certain Sum on a certain Day, there a Tender at the Day, and that he hath been ready ever since to pay, is a good Plea; but 'tis not so in Assumpsit; for tho' he might be ready to pay ever since the Tender, yet that being after the Promise made, and probably after it was demanded to be paid, 'tis not good, for it not being paid, the Promise is broken, so 'tis likewise in Debt upon a single Bill; therefore in these Cases the Defendant must plead *semper paratus*: He held, that in an Action of Debt Tender and Refusal might be

2 Salk. 622.
In Debt on a Bond to pay a certain Sum on a Day, there a Tender on the Day, and *semper paratus*, is a good Plea, but not in *Assumpsit*.

be pleaded in Bar of the Damages, but not in Bar of the Action, for the Debt still remains : That in Assumpsit a Tender likewise might be pleaded in Bar of the Damages ; but of this there hath been some Doubt, for he held, that in such Case the whole Demand being in Damages, a Plea in Bar to the Damages goes in Bar to the Action ; therefore he said he should favour any Course to help a Defendant in such Case, as by allowing him to bring a Sum of Money into Court, and praying Judgment, *de ulterioribus damnis*, or by confessing Damages to so much, which he is ready to pay, and pray that the Plaintiff may proceed at his Peril.

Horne *versus* Lewin. Trin. 1699. B. R.

2 Salk. 583. (7.) **I**N Avowry for Rent, the Plaintiff replied, that he was ready upon the Land on the Day of Payment till Sun-sett, and no one was there to receive the Money, and that he is still ready to pay it, and so *petit judicium & damna*, this was adjudged naught ; but if it had been *petit judicium de damnis*, it had been good, for his being ready to pay excuses the Damages, but doth not bar the other of his Rent.

T E N O R. See Libel, 2.

Term

Term and Vacation.

(1.) **A** Recovery was suffered on the first Day of Michaelmas-Term, about eleven of the Clock in the Morning, and the Recoveror died in the same Morning about two Hours before; yet this was adjudged good, for the Writ was returnable three Days before, and the Judgment shall relate to that Day. Sid. 229.
Where Judgment shall relate to the Day.

(2.) The Efloin-Day is the first Day of every Term in Respect to legal Proceedings, and Judgments shall relate to that Day; and not to the quarto die post; but if a Man is bound to appear, or to pay the Money on the first Day of the Term, tunc loquimur ut vulgus, and then the quarto die post is the first Day. 1 Cro. 102.

(3.) St. John's Day, non est Dies Juridicus, and therefore the Judges never sit on that Day, unless it happen to be the first Day of the Term. 2 Cro. 16.

(4.) If the next Friday after Corpus Christi Day, happen to be on Midsummer-Day, yet that must be a Hall-Day, tho' otherwise it would not, for the Friday next after Corpus Christi is appointed by the Statute to be the first Day of Trinity-Term; and if this be not reckoned, the Term would not begin till Friday in the next Week following. 1 Roll. Rep. 29.

Y y

Time.

T I M E. See Issues joined, 1.

Scott *versus* Hogson. Trin. 11 Will. III. B. R.

Assumpsit to run a Horse at such a Time as the Plaintiff shall appoint, and he sets forth that he appointed such a Day, good.

(1.) **A** *Stumpsit* to run a Horse at such Time and Place as the Plaintiff should appoint, and the Plaintiff declares, that he did appoint such a Day; it was doubted, whether this was appointing a Time, which is more certain and determinate than a Day: But per Curiam, by appointing a Day the Law will supply the Rest, and fix it to the most usual and convenient Time of that Day.

Davy *versus* Salter. Mich. 3 Annæ. B. R.

Mol. Cases, 230.

* 1 Cro. 275.
Jones 300.
1 Roll. Abr. 595.
Yelv. 140.
* 1 Cro. 11.
2 Cro. 16.

(2.) **A** Writ of Inquiry was executed in tres septimanas Trin. (which was on Sunday the 13th Day of June), and the Writ was returned to be executed on the 14th Day; and upon a Writ of Error brought it was insisted, that the Court could not take Notice of the * Days of the Month, if they did, then * Sunday ought not to be reckoned, but Monday instead thereof; that if Sunday be the first Day of the Term, all Judgments will be on a Sunday. Et per Holt Ch. Just. If Sunday happen to be the quarto die post, it must of Necessity go to the Monday following; and so 'tis of Essoins, for they cannot be held on a Sunday, and as to the Relation of Judgments to the first Day of the Term, it can only be to the first Juridical Day, and all Quindenams & octabis are inclusive. In this Court the Entry is, die lunæ proxime post, &c. which is inclusive; in the Common Pleas the Entry is, A die lunæ, and yet that is inclusive too of the Day; and he was of the same Opinion as in Harvey and Broad's Case.

Styles 382.

(3.) Submission to an Award by Bond dated 12 Septemb. so as it be made within six Days after the Date of the Bond, and it was made on that very Day on which the Bond was dated. Et per Curiam, 'Tis good, because that Day shall be inclusive, and be taken to be one of the six Days.

(4.) Moved to quash an Indictment upon the Statute 12 H. 4. cap 7. for a Riot, because Inquisition was not taken within a Month, (viz. twenty-eight Days) after the Offence committed, which is expressly required by the Statute: Sed per Curiam, the Time shall be computed, not according to twenty-eight Days, but according to Kalendar Months.

Sid. 186.
4 Mod. 96.
Computa-
tion of Time
according to
the Kalen-
dar.

T I T H E S.

(1.) **A**LL Things titheable which grow from the Earth immediately, either as a natural Product thereof, or by the Industry of Men, as Corn, Hay, Wood, Herbs, &c. are called predial Tithes.

What are
predial
Tithes.

(2.) But those which do not arise immediately from the Earth, as Cattle, &c. and which are not the Product thereof, but are nourished by it, the Tithe thereof is called mixt Tithes.

What are
mixt Tithes.

(3.) But personal Tithes are from and in respect of the Labour of Men.

What are
personal
Tithes.

(4.) All small Wood, under Timber, and likewise Timber, when cut down under twenty Years Growth, is called Sylva cadua, and titheable; but Timber-Trees, after twenty Years Growth, are not titheable, neither are the Loppings or the Bark, or the Boughs of such Trees titheable, because Part of the Trees themselves.

Wood and
Trees.

(5.) Sylva cadua cut down to sell shall pay Tithes, but not to burn in the House, or to repair the same, or to enclose, or to enlarge the House for necessary Habitation.

Sylva cadua,
where it pays
Tithes,
where not.

(6.) If a Coppice is cut, and the Tithes paid, and afterwards the Roots are grubbed up, they shall not pay Tithes, because they are Parcel of the Inheritance, and of the Land.

1 Roll. 637.
Roots grub-
bed up shall
not pay
Tithes.

(7.) Timber-Trees mortuæ, aridæ & putridæ, pay no Tithes, for being once discharged by being upwards of twenty Years Growth, they shall be always discharged.

Cro. Eliz.
477.
Trees more
than twenty
Years
Growth pay
no Tithe.

Discharge of
Tithes.

(8.) Tithes may be discharged three Ways, either by real Composition, *de modo Decimandi*, or by Prescription. (2.) By a general Prescription, *de non Decimando*. (3.) Or by Grant.

Jones 368.
Hob. 307.
Discharge *de*
modo Deci-
mandi.

(9.) A Discharge by real Composition *de modo Decimandi* is where Money or Land is enjoyed by the Parson, Time out of Mind, in Lieu of his Tithes; in this Case the Law always intends a Contract, or original Bargain, and this is a Charge which runs with the Land, and whereof any Lay Owner shall take Advantage, for the Modus is become the Tithe, and the very Tithe in Specie is extinguished.

Jones 368.
Cro. Car. 422.
Hob. 307.
Hard. 315.
Discharge by
Prescription.

(10.) (2.) A Discharge by Prescription in non Decimando is a Privilege only incident to Spiritual Persons; for as they are only capable of Tithes in Pernancy, so they only can discharge themselves by a general Prescription in non Decimando; this is therefore a personal Privilege which doth not run with the Land, so that if it be conveyed over, Tithes must be paid in Specie.

Discharge by
Grant.

(11.) (3.) A Discharge by Grant, and this is either to particular Persons or Corporations by the Pope's Bull, or to whole Orders of Men by Act of General Council, as to the Templars, Hospitallers, Cisterians, &c. and this Privilege is also personal, and cannot pass from one Person to another; so that if the Land be conveyed over, or reverting to the Founder, the Alience and the Heirs of the Founder shall pay Tithes.

By the Sta-
tute 27 H. 8.

(12.) Now these personal Privileges are to be considered as they stand affected by the Statute 27 H. 8. by which Statute all Abbeys, &c. under the yearly Value of 200 l. per Annum, are given to the Crown; and because there is no Clause in that Statute to revive and save all personal Privileges belonging to the Abbeys, &c. therefore they are destroyed and extinguished.

By the Sta-
tute 31 H. 8.

(13.) By another Statute 31 H. 8. All Abbeys, &c. above the Value of 200 l. per Annum, are likewise given to the King, and in that Statute there is a Clause to revive and preserve all former Privileges.

1 Cro. 423.
Jones 368.
Hob. 307.
Hard. 101.

(14.) Therefore these, whether discharged by Prescription, Grant, or Composition, in the Hands of former Owners, continue in the same Manner discharged of Tithes in the Hands of the King or his Patentees.

Wharton *versus* Lefle. Trin. 5 Will. III.

(15.) **I**N a Parish consisting of 700 Acres of arable, and 700 Acres of Pasture Lands; there were twenty-six Acres sowed with Flax; adjudged by three Judges, contra Holt Ch. Just. that the Tithes thereof belong to the Vicar as a small Tithe, being so in its Nature; but the Chief Justice held, that the Nature of the Tithes depends upon the Nature of the Thing it self, and not upon the Nature of the Place where 'tis sown.

3 Lev. 365.
4 Mod. 183.
3 Cro. 467.
Hutt. 73.
Moor 99.
Owen 74.

T R A D E.

Mayor of Winchester *versus* Wilks. Pasch. 4 Annæ, B.R.

(1.) **T**HE Corporation of Winchester declared upon a Custom, that it was not lawful for any Person to exercise a Trade there, except homines liberi Gildæ mercatorie Civitatis illius; &c. Et per Curiam, it was agreed, that such a Custom in London might be good, because their Customs are confirmed by many Acts of Parliament; but it was doubted, whether such Custom was good in any other City or Borough, for since the Defendant is at Liberty to live in that Place, 'tis unreasonable to restrain him from using a lawful Means for his Support and Livelihood: However, per totam Curiam, this Declaration is naught; for non constat, that the Corporation hath Gilda mercatoria, and it doth not appear, whom the Homines liberi de Gilda mercatoria are; so they may be the whole Corporation, or some Part of them; and antiently the King's Grant to have Gildam mercatoriam, made them all a Corporation, (viz.) All the whole Till.

Mod. Cases
21.
1 Salk. 203.
Whether
such a Corporation
hath Gilda
mercatoria.

Bridget Glas's Case. Mich. 8 Will. III.

* Cap.
Par. 7.
Information,
where it must
be brought
in the pro-
per County.

* 6 Rep. 19.

† 1 Cro. 23.

(2.) **S**HE was indicted before Commissioners of Oyer and Terminer at the Old Baily, on the Statute 1 & 2 * Ph. & Mar. by which 'tis enacted, that no Person living in the Country shall sell any Haberdashers Wares by Retail, in any City or Town corporate, except it be in open Fairs, on Pain of Forfeiture for every Offence, 6s. 8d. and of the Wares sold, the one Moiety to the King, the other to him who shall seise and sue for the same in any of the King's Courts of Record, by Bill, Plaint, Debt, Information, or otherwise, &c. and that the Defendant did sell Haberdashers Wares, &c. contra formam Statuti: Mr. Northy moved to quash this Indictment, upon the Authority of * Gregory's Case and of † Farrington's Case, because those Words, (viz.) The King's Courts of Record extend only to the Courts at Westminster: Et per Curiam, 'tis true, Justices of Peace have not any Jurisdiction in this Case; but it hath been ruled since Gregory's Case, that Justices of Oyer and Terminer may determine this Matter by Way of Indictment, tho' not by Information: But since the Statute hath prescribed a particular Way to recover the Forfeiture, (viz.) by Action of Debt or Information, without mentioning an Indictment, therefore the Defendant is not indictable upon this Statute, for which Reason this Indictment was quashed.

Mary Read's Case.

Indictment
for using a
Trade not
good.

(3.) **S**HE was indicted for using the Trade of a Linen Draper at B. not having served seven Years Apprenticeship to that Trade, the Caption was Ad generalem Sessionem Pacis tent coram Majore and Burgesles of Bridgwater, infra Burgum de Bridgwater; it was objected, that an Indictment for this Offence cannot be taken at a Sessions of a Town-Corporate, but only at the General Quarter-Sessions of the County, and this by Virtue of the Statute 31 Eliz. and even in that Case it will not be sufficient to say, ad generalem Sessionem, but ad generalem quarterialem Sessionem pacis, &c.

The King versus Hicks. Mich. 4 Will. III. B. R.

* Cap. 4.

(4.) **I**Information was brought against the Defendant upon the Statute * 5 Eliz. for Using the Trade of, &c. not being Apprentice to it for seven Years; the Information was brought in
this

this Court, and the Using the Trade was in Yorkshire. Et per Curiam, this Information will not lie here, because by the Statute *21 Jac. it must be brought in the proper County, and all Informations against the Form of the Statute will be void.

The Queen versus Eliz. Franklyn.

(5.) **S**HE was indicted at a Quarter Sessions of a Borough, for exercising a Trade, not having served seven Years Apprenticeship, and Mr. Eyre moved to quash it, because the Prosecution was commenced a Year after the Offence was committed. Et per Curiam, Upon View of the Statute of 5 Eliz. where a Moiety of the Forfeiture is given to the Informer, he must prosecute within the Year; but the Queen's Suit is not confined to the first Year, but she shall have another Year, where the Forfeiture is distributed by Moieties, and in such Case, where the Party neglects the first Year, she shall have the whole.

1 Salk. 370:
Quashed on
another Ex-
ception.

(6.) A Pippin-Monger is no Trade within the Statute 5 Eliz. but a Brewer is, Quare of an Upholsterer; but Plowing and Digging are not Trades within the Statute, for 'tis not Matter of Skill but of Strength.

1 Roll. Rep.
10.
What Trade
is within the
Statute, what
not.

T R A V E R S E.

Anonymus. Hill. 1 Anna.

(1.) **T**HE Defendant was sued by the Name of John, and he pleaded, that he was baptized by the Name of Benjamin, and traversed, that ipse idem Johannes was ever known by the Name of John; and upon a general Demurrer to this Plea, per Holt Ch. Just. this Traverse is repugnant in itself, and very immaterial, for it had waived the precedent Matter of Baptism, which was well pleaded, and was now become the Substance of the Plea

Where a
Traverse is
repugnant.

Plea it self; for now the Issue must be by what Name the Defendant was called or known, and not by what Name he was baptized, whereas he ought to have relied on his Name of Baptism, and concluded with it without a Traverse, for a Man can have but one Name, therefore it implies, a Negative in itself, without saying he was never known by the Name of John, &c.

Bullen *versus* Benson. Mich. 10 Will. III. B. R.

Where a
Plea is not
good with-
out a Tra-
verse.

(2.) **D**E B **T** upon a Sheriff's Bond for an Appearance dated 20 Novemb. 9 Will. 3. conditioned, that the Defendant should appear in B. R. die lunæ prox' post quinden' Sancti Martini, &c. The Defendant pleaded the Statute, and that the Bond was primo deliberat' by him 30 Novemb. and that he was then taken and arrested by the Plaintiff by a Writ returnable in Michaelmas-Term, &c. in B. R. and being so in Custody the Plaintiff took this Bond, & hoc paratus est verificare. And upon a Demurrer to this Plea it was adjudged ill, for when the Defendant had pleaded, that the Bond was primo deliberat' on the 30th Day of November, he should not have rested there, but have traversed, that he delivered it on the 20th of Novemb. according to Yelverton 138. for here the Date is material; for supposing the Arrest was before the Return of the Writ, and then after the Return the Plaintiff took a Bond antedated; this Bond is void because the Defendant was legally in Custody for Want of Bail, and ought to have been kept in Custody.

Beats *versus* Simpson. In C. B.

Virtute cujus
is not tra-
versable.

(3.) **T**H E Case was, **H**. Two Habeas Corpora were pleaded, and both of different Tests and Returns, the other Side replied, that he was brought up Virtute of the first Writ Absq; hoc, that he was brought up Virtute of the other Writ; and per Treby Ch. Just. a Virtute cujus is never traversable, because 'tis not a positive Allegation, but only a Deduction or Inference from another Matter. So is a prætectu cujus, and vigore cujus, and per quod, &c. for these Things, Nec augent nec diminuunt sed confirmant tantum. Powel Justice agreed that Virtute cujus was in many Places no more than a bare Inference; but sometimes when it took in Matter of Fact, then it signified something by Way of Allegation, whereupon, &c. and then 'tis traversable, and it may so happen that nothing else is traversable.

Suppose two Writs are taken out against W. R. of the same Teste, but of different Returns; and at the different Suits of A. and B. and afterwards A. procures a Warrant by which W. R. is arrested, and he gives a Bail-Bond, and in an Action of Debt brought on this Bond, the Condition whereof was for the Defendant to appear die, &c. he (the Defendant) pleads the Statute, and that he was then in the Custody of the Sheriff, by Vertue of a Writ returnable on another Day; the Plaintiff may reply, that he was in Custody, &c. by Vertue of a Writ returnable, as in the Condition of the Bond, & non virtute Brevis pradiet' in placito defendantis mentionat'; quod fuit concessum per Nevill & Blencow Justices: Quære tamen, for this is contrary to Greenvills Case, and against the Opinion of Hale Ch. Just.

Anonymus. Pasch. 9 Will. III. B. R.

(4.) **W**HERE a Matter is confessed and avoided it need not be traversed. In Replevin the Defendant avowed, for that W. R. was seized and made a Lease to him (the Defendant) for one Year, and so justified the Taking, &c. Damage-feasant. The Plaintiff replied, that true it is, that W. R. was seized, &c. but before he made a Lease to the Defendant he made another to the Plaintiff, which is still in Being, and not determined, this is sufficient without a Traverse, because the Title of the Defendant is confessed and avoided; but if the Plaintiff had traversed the Lease of the Defendant, it would have been good upon a general Demurrer, being only in the Nature of a double Plea; but upon a Special Demurrer it had been naught.

Where a Matter is confessed and avoided, it need not be traversed.

(5.) That the Inducement to a Traverse ought always to contain sufficient Title, but 'tis not material, whether the Matter is true or false: Now the Reason why the Inducement should contain a Title, is because a Man ought not to deny the Title of another, without shewing colourable Title in himself; for if the Title traversed be found to be ill, and no Colour of Right or Title appears for him that traversed that Title, then no Judgment could be given.

Cro. Car. 265, 266. Inducement to a Traverse ought to contain a sufficient Title.

But the Inducement to a traverse can never be traversed, because that would be a Traverse after a Traverse, which would be not only infinite but absurd, because it would be to quit his own Title, and fall upon the Title of another.

Inducement to a Traverse cannot be traversed.

Groenvelt *versus* Burwell & al' Trin. 12 Will.
III. B. R.

* 1 Salk. 144,
200, 263.
Where the
Legality of
a Warrant
was put in
Issue, 'tis ill.

21 H. 6. fo.
5. B.

(6.) **T**H E R E are some short Notes of a Case between these Parties, but upon other Points, in * 1 Salk. but the Case was thus: A. In Trespafs and False Imprisonment for an Assault, Beating, Wounding and Imprisoning him; the Defendant as to the Beating and Wounding, pleaded Not guilty, Et quoad Residuum transgression', &c. he set forth a Power in the College of Physicians in London to examine and commit for ill Practise in Physick, and that they adjudged the Plaintiff guilty de mala praxi, &c. and so they made a Warrant to the Defendant to arrest him and to carry him to Newgate, by Vertue of which Warrant they did arrest the Plaintiff, &c. Quæ est eadem resid', &c. The Plaintiff protestando against the Power, for Plea said, that the Defendant arrested him de injuria sua propria, & non Virtute Warranti pred'; and upon Demurrer to this Replication it was adjudged ill, for the Traverser doth not deny that there was such a Warrant, but the Legality of it, and that the Plaintiff was not taken by Vertue thereof, which implies, that he might be taken for some other Cause, and if that was his Case, then he should have pleaded it Specially, and shew for what Cause he was taken: Now by this Replication it may be intended, that the Warrant was after the Arrest, and that there was no such Warrant, therefore he should have traversed Absque hoc, that there was a Warrant, or Absque hoc, that it issued before the Arrest, and then a Matter of Fact (from whence a Question in Law might arise) would have been put in Issue, and not the Legality of the Warrant, which is Matter of Law.

Radborne *versus* Kennadale. Mich. 4 Jac. II.
Rot. 640.

3 Mod. 311.
In Trespafs
and in an
Avowry, if a
Freehold is
pleaded, it
must be tra-
versed.

(7.) **I**N Replevin, the Defendant made Conufance as Bailiff to Sir A. B. setting forth, that he was seised in Fee of the Place where, &c. and so justifies the Taking the Cattle Damage-feasant: The Plaintiff in his Replication confesses the Seisin of Sir A. B. the Son, but pleads, that his Father was seised, &c. in Fee, and made a Lease to W. R. for three Lives of the Place where, &c. that W. R. was dead, and that W. W. entered as Occupant, and made a Lease to the Plaintiff; and upon a Demurrer to this Replication in Bar, for that the Plaintiff had not traversed the Seisin in Fee of the Son, it was held per Curiam,

riam, relying upon the Case in * Bullstrode, that either in Trespass or in Avowry, if a Freehold is pleaded, it must be traversed, unless the Party doth wholly * confess and avoid it by a defensible Title, only with this Difference; that if in an Action of Trespass a Freehold is pleaded, the Party may traverse it generally, without inducing his Traverse by a Title, but in * Avowry, the Traverse must be induced by setting forth a Title: Et per Curiam, the Want of a Traverse is Matter of Substance in the principal Case, because there are two Affirmatives in the Pleading, and that will not admit any Trial without a Traverse, therefore 'tis not helped by a general Demurrer, but a superfluous Traverse is only Matter of Form, because it doth the other Party no Injury.

* 1 Bullst. 48.

* Dyer 171.

3 Cro. 650.
Sid. 227.

* Owen 51

1 Leon. 44
denied.1 Roll. Rep.
24.

Newdigate *versus* Selwin. Pasch. 2 Will. III. B. R.

(8.) **I**N Covenant for not Keeping and employing his Apprentice; the Defendant pleaded, that from such a Time to such a Time he did keep and employ the said Apprentice, and that then he servitium ipsius (the Defendant) deseruit & reliquit & ab eo decessit & ulterius in servitio suo remanere neglexit & abinde postea hucusque ad loca incognita sese elongavit & absentavit; the Plaintiff replied and traversed, absque hoc quod servitium (the Defendant) deseruit vel reliquit vel ab eo decessit, vel in servitio suo remanere (omitting neglexit) vel sese elongavit; and upon a Demurrer to this Replication it was objected, that the Traverse was multifarious, consisting in so many particulars in the Disjunctive, and that by omitting the Word Neglexit, it was not Sense: Sed per Curiam, the Traverse is good, for 'tis pursuant to the Defendant's Plea, which may be traversed, as he hath pleaded it; and that Part of it, which is Nonsense, will not hurt, because the Traverse is good without it.

Where a Traverse is good, because pursuant to the Plea.

Helliot *versus* Selby. Trin. 2 Annæ.

(9.) **T**HIS Case is reported in * 2 Salk. but upon another Point: *scilicet* In Replevin, the Defendant avowed Damage-feasant; the Plaintiff replied, that W. R. was rite & legitimate, seised of the Manor of H. and being so seised, did grant a Cophhold Messuage to him 12 Julii, in such a Year, and that he had Common in the Place where, &c. for himself and Tenants, &c. The Defendant rejoins and traverses, that W. R. was rite & legitimate seised in Fee, and granted the Cophhold Messuage to the Plaintiff on the 12th of July, &c. and upon a Demurrer to this Rejoinder it was adjudged ill; for per Curiam, the Rite & legitimate

* 2 Salk. 701.
What is not traversable.

Dyer 365.
contra.

gitime is not traversable, nor the Day of the Grant; for if the Lord of the Manor was a Disseisor, 'tis as to this Purpose the same Thing as if he was lawfully seised; and the Day of granting it is not material, for a Grant at one Day is a Grant at any Day.

Longford *versus* Webber. Hill. 2 & 3 Jac. II.
Rot. 965.

Where a Justification upon a Possession is not good.

(10.) **I**N Trespass, the Defendant pleaded, that he was lawfully possessed of such a Close, and so justified the Taking the Cattle Damage-feasant in his Close; and upon a Demurrer to this Plea the Plaintiff had Judgment; for tho' it was insisted, that there was the same Reason for justifying upon a Possession, that there was for maintaining an Action upon a bare Possession; yet the Court held, that there never was such a Traverse as Absq; hoc quod possessionatus fuit, for a Possession cannot be but by Contract, but a Seisin may be by Right or Wrong, and he who hath Seisin, hath by Law a good Title against all Men but the Disseisee, for he may maintain an Assise.

Horn *versus* Lewin. Hill. 12 Will. III. B. R.

2 Salk. 583.
Where a Traverse is ill, where not.

(11.) **I**N Replevin, the Defendant avowed for a Rent-charge in arrear; the Plaintiff replied, de injuria sua propria absq; hoc, that the Rent was in arrear; and upon a Special Demurrer, for that this Replication and Traverse amounted to no more than the General Issue; and per Curiam, this is not a proper Inducement to the Traverse, as if in Trespass a Man should plead de injuria sua propria absq; hoc quod est culpabilis, so de injuria sua propria * absq; hoc quod he is Bailiff, and de injuria sua propria absq; hoc, that there was such a Prescription, these are naught, the natural and proper Plea to this Avowry had been nihil in aretro, which is quasi the General Issue, so that this is a pleading Special Matter, which amounts to the General Issue; and no other Evidence can be given but such as might have been given upon the proper Issue; therefore this Circumlocution is ill, because it prolongs the Cause by enforcing the Avowant to an unnecessary Replication; and tho' 'tis no more than Matter of Form, because it doth not alter the Evidence; yet per Holt Ch. Just. this being upon a Special Demurrer, is naught.

* 1 Roll. Rep. 46.
Raft. Ent. 557, 558, 630.

Anonymus. Pasch. 9 Will. III.

(12.) **P**ER Holt Ch. Just. A Man ought to induce his Traverse, and the Reason is, because he ought not to deny the Title of another, till he shew some colourable Title in himself, for if the Title traversed be found naught, and no Colour of Right appears for him who traversed, it would happen, that no Judgment could be given; but an Inducement cannot be traversed, because that would be a Traverse after a Traverse, which would be not only infinite but absurd; for 'tis quitting his own Pretence of Title, and falling upon the Title of another.

There must be an Inducement to a Traverse.

(13.) In Trespass for taking and carrying away his Goods 1 die Januarii, the Defendant justifies the Taking 2 die Januarii, quæ est eadem transgressio; adjudged naught upon a Demurrer, because he doth not Traverse the Time before and after; and to say quæ est eadem, &c. is not sufficient, because that is not traversable.

1 Vent. 184. Where the Time must be traversed before and after the Trespass.

(14.) In Trespass laid to be done 1 August, the Defendant justifies for Right of Common after the Corn is cut, and that after it was cut he put in his Cattle, absq; hoc quod est culpabilis aliter vel alio modo; and upon a Demurrer to this Plea it was adjudged ill, because it did not answer the Trespass done, 1 Aug. having no Reference to that Time.

Where the Traverse doth not answer the Time.

(15.) In false Imprisonment, &c. the Defendant justified under a Latitat, and a Warrant thereon, virtute cujus he arrested the Plaintiff at H. &c. Absque hoc quod est culpabilis aliter vel alio modo; the Plaintiff replied, de injuria sua propria absq; tali causa; 'tis true, upon a Demurrer this Replication was held ill, because there was Matter of Record, (viz.) a Latitat and Matter of Fact, (viz.) An Arrest set forth in the Plea, which the Plaintiff ought to have answered in a particular Manner, and not generally, by saying absq; tali causa.

3 Lev. 65.

(16.) In Trespass for Breaking and Entering his Close, the Defendant justified by a Prescription to dig for Coals; the Plaintiff replied, de injuria sua propria absq; tali causa, but did not Traverse the Prescription in a particular Manner; and upon a Demurrer to this Replication it was objected, that the Plaintiff ought to have traversed thus (viz.) Absq; hoc, that the Defendant, and all those whose Estate he had in the Premises, have, Time out of Mind, used to enter into the Close, &c. and to dig there for Coals.

2 Lutw. Killburn v. Valence.

T R E A S O N.

The King versus Speke. Mich. 1 Will. III. B. R.

Judgment in High Treason reversed, because the Court did not demand of the Defendant what he had to say.

(1.) **W**rit of Error to reverse an Attainder of High Treason, the Error assigned was, that upon Oyer of the Indictment, the Defendant Speke confessed it, and thereupon Judgment was given, but without demanding of him, what he had to say for himself, why Judgment should not be given: And per Curiam, this is erroneous, for 'tis a necessary Question, because he may have a Pardon to plead, or may move in Arrest of Judgment, for which Reason the Attainder was reversed.

Before the Stat. 25 Ed. 3. Treason was an incertain Crime.

(2.) At Common Law, before the Statute 25 Ed. 3. Treason was a very incertain Crime; for Killing the King's Messenger was Treason; so likewise where a Man grew popular, this was construed to be Incredaching Royal Power, and held to be Treason, so that by the Excess of these Times, any Crime, by aggravating the Circumstances thereof, was heightened into Treason.

(3.) Therefore this Statute was made to determine what should be Treason; and since it was made, there can be no constructive Treason, (i. e.) nothing can be construed to be Treason, which is not literally specified in that Statute; therefore counterfeiting the Coin is Treason within the Letter of this Act, but Wishing it is not, nor Filing or Clipping, tho' within the same Mischief and Effect, for this Statute must not be construed by Equity, because 'tis a declarative Law, and one Declaration ought not to be a Declaration of another; besides, it was made to secure the Subject in his Life, Liberty and Estate, which by admitting Construtions to be made of it might destroy all.

1 Vent. 349. Treason done beyond Sea may be tried in *Midlesex*.

(4.) The Defendant was indicted for High Treason in raising a Rebellion in Carolina in America, and tried at Bar in Westminster-Hall and acquitted; and it was held, that this Trial was good by Vertue of the Statute 25 H. 8. cap. 2. by which 'tis enacted, that foreign Treasons, may be tried by a Special Commission,

tion, or by the Court of King's Bench by a Jury of Middlesex, that being the County in which that Court sits.

T R E S P A S S.

Lambert *versus* Thurston. Pasch. 2 Will. III. B. R.

(1.) **T**RESPASS for breaking his Close vi & armis & damnum 20 l. and upon a Demurrer to this Declaration, it was objected, that the Damages being laid to be under 40 s. the Suit ought to have been in the County-Court; Sed per Curiam, The Trespass is alledged to be done vi & armis, and for that Reason the County-Court cannot hold Plea of it, for they cannot Fine, being no Court of Record, and 'tis at the Plaintiffs Election to declare vi & armis or not.

3 Mod. 275.
Trespass vi
& armis cannot be tried
in the County-Court.
43 Ed. 3. 21. b.
2 Inst. 311.
F. N. B. 47.
1 Mod. 215.

Brook *versus* Bishop. Hill. 1 Annæ B. R.

(2.) **T**RESPASS, Quare vi & armis 2 die Aprilis, the Defendant clausum (of the Plaintiff) fregit & intravit & herbam suam pedibus ambulando conculcavit & consumpsit, and also for cutting down his Under-Wood and Trees, transgressionem predictam a predicto secundo die Aprilis usque 28 ejusdem mensis diversis diebus & vicibus continuando. Upon Not guilty pleaded, the Plaintiff had a Verdict and entire Damages; it was moved in Arrest of Judgment, that the Cutting the Trees did not lie in Continuance. Et per Holt Ch. Just. That is very true, but then the Continuance is void as to that Trespass and Damages shall be intended to be given by the Jury for those Trespasses of which there might be a Continuance; but then it was objected, that the Plaintiff at the Trial gave Evidence of the Defendant's cutting Trees and Under-Wood at several Times, which per Curiam, could not be upon this Declaration, at least it ought not

2 Salk. 639.
Trespass
with a
Continuance,
not good.

to

to have been, and therefore shall not be intended : But the Way to declare for such Trespasses which lie in Continuance, and if the Plaintiff would give Evidence of several Trespasses, is for him to set forth in his Declaration, that the Defendant, between such a Day and such a Day cut several Trees, and not to lay a Continuando transgression from such a Day to such a Day ; and upon such a Declaration he may give in Evidence a Cutting on any Day within those Days ; so is the Year-Book * 21 H. 6. 210. In Trespass, for that the Defendant, between such a Day and such a Day, per diversas Vices took and carried away so much Corn, Quod nota for the Right Way of declaring : Et per Powell Justice, the Practice was to give in Evidence several Trespasses upon the Way of declaring, as in this Case, but that it was Wrong ; and if the Plaintiff had done so at the Trial, as it was alledged, he ought not to have Judgment.

Gipps *versus* Wollescot. Trin 7 Will. III. B. R.
Rot. 301.

Trespass for
fishing and
taking *Sal-*
mones, and
did not say
suos, not
good.

(3.) **T**respass against the Defendant, for that he in separali piscaria & in libera piscaria sua apud H. piscavit, and did take and carry away 500 Salmons. Per Holt Ch. Just. a Man may have a free Fishery in his own Soil ; as for Instance, suppose he hath a River within his Manor, and another hath a Right of fishing with him ; but because it was not said *Salmones suos*, nor *ibidem cepit*, the Defendant had Judgment. The same Point was adjudged Pasch. 5 Will. 3. between Smith and Kemp.

Sid 239.

(4.) Per Curiam, In Trespass the Defendant may plead a Title ; but if an Action of Trespass be brought for the Mesne Profits, after a Recovery in Ejectment the Defendant can neither plead a Title or give it in Evidence.

1 Vent. 329.
Trespass
with a *Con-*
tinuando, not
good.

(5.) In Trespass for Fishing in his several Fishery, and for taking twenty Bushels of Oysters, continuando piscationem praedictam, from such a Day to the Time of the Action brought : Upon Not guilty pleaded, the Plaintiff had a Verdict, but could never get Judgment upon the Authority of * Playter's Case, because the Fishing mentioned under the Continuando was incertain, not expressing the Quantity or Quality of the Fish ; 'tis true Hale Ch. Just. said, that they were more strict formerly in the Certainty of Pleading than now, for now an Indebitatus Assumpsit for Goods sold is held well, without any farther Certainty.

(6.) In Trespass for breaking his Close and Eating his Grass with Cattle; the Defendant pleaded, that at the Time of the Trespass, &c. he was possessed of all the Corn growing on four Acres of Land Parcel of the locus in quo) as of his proper Goods, by Reason whereof at the Time in which the Trespass was supposed to be done, he entred with his Cattle to mow, take and carry away the Corn, and in entring, the said Cattle did the Trespass, spasm & raptim, and so justifies the Trespass precisely; and upon Demurrer this Plea was adjudged ill, because the Defendant did not set forth any Title which he had to the Corn, but only that he was possessed thereof, which is not sufficient without a Title, because the Property shall be intended to be in the Owner of the Soil.

2 Saund. 431.
Where the Defendant pleads a Possession, but did not set forth a Title, not good.

Trial and New Trial.

King *versus* Alberton. Mich. 10 Will. III. B. R.

(1.) **A** Motion was made for a New Trial, because the Defendant having pleaded a Composition with his Creditors had forgot to carry down Witnesses at the Trial to prove the Subscribers Hands. Sed per Curiam, it was denied, because the Plaintiff sued for an honest Debt, and Holt Ch. Just. remembred the Case of an Action of Debt brought against an Heir, who pleaded Reins per descent, upon which they were at Issue, and there was a Verdict against the Heir, because he had not brought the Settlement with him, by which he was seised of an Estate-tail, and for this Reason he moved for a New Trial; but it was denied, because the Plaintiff had recovered an honest Debt.

Where a New Trial shall not be granted.

Anonymus.

Where the Trial shall be *per medietatem lingue*, where not.

(2.) **I**N Covenant, after a Verdict for the Plaintiff, the Defendant moved for a New Trial, suggesting that he was an Alien, and that the Sheriff had returned twelve of the Jury, but that there was not an Alien amongst them: Et per Curiam, the Defendant shall never have a Trial *per medietatem lingue*, without Prayer, and if 'tis granted, and the Sheriff returns none but Denizens, the Defendant ought to challenge them before the Trial; and if the Challenge is not allowed, then to insist on a Bill of Exceptions; but the Suggestion now made by this Defendant is against the Record; and if 'tis true, he may have an Action against the Sheriff for a false Return.

Note, If an Alien is sued as Executor he shall not have a Trial *per medietatem lingue*, because in such Case he is sued in *auter Droit*.

Sir Ch. Berrington's Case, &c al. 2 Mich. 5 Annæ
B R.

Trespass against several Defendants, the Plaintiff had a Verdict, but as to one of them it was against Evidence, no New Trial was granted.

(3.) **I**N Trespass and False Imprisonment against several Defendants, the Plaintiff had a Verdict; and afterwards it was moved for a New Trial, because as to one of the Defendants the Verdict was against Evidence. Sed per Curiam, This cannot be done, for the Court cannot set aside the Verdict as to some, and not as to others, and to grant a new Trial as to all would be a Prejudice to those who are duly acquitted.

Anonymus.

No New Trial on an Indictment for Perjury.

(4.) **T**HE Attorney General moved for a New Trial at Bar for the King, upon an Indictment for Perjury, but it was denied, because the King is not interested in the Indictment, otherwise than in Point of Common Justice.

Anonymus. Pasch. 1702. B. R.

Of carrying down a Cause by Proviso.

(5.) **R**Uled, that if the Plaintiff would not enter his Issue, or if 'tis entered, and he will not carry down the Cause to Trial, the Defendant may by Rule compel him to enter it, and
if

if 'tis entered, the Defendant may carry it down by Proviso; and that this is the standing Rule of the Court; and in this Case Sergeant Darnel moved, that the Plaintiff's Evidence depending on certain Town-Books in the Custody of the Defendant, and that he having refused to give Copies thereof, &c. that the Plaintiff might not be compelled to proceed till the Defendant gave him Copies, but it was denied; for per Holt Ch. Just. the Defendant is not bound to help the Plaintiff to Evidence against himself.

The Defendant not bound to help the Plaintiff to Evidence

Regula. Hill. 16 Car. II. B. R.

(6.) **O**Rdinatum est, quod nisi causæ triandæ apud London & Middlesex intratæ fuerint cum capitali Justitiario hujus Curia per spatium duarum dierum ante Sessionem qua triandæ sunt, marescallus potest intrare Ne recipiatur ad instantiam defendantis vel ejus Attornati, &c.

Rule.

Hall *versus* Hill. Mich. 1 Annæ.

(7.) **I**N an Action brought in an inferior Court, (viz.) in the Court at Bristol, the Plaintiff had a Verdict and Costs taxed; and after a second Scire facias against the Bail, the Judge of that Court granted a new Trial, and thereupon the Court of B. R. being moved, made a Rule for the Judge of the inferior Court, to shew Cause why an Attachment should not be granted against him: For per Curiam, tho' a new Trial ought to be allowed, if freshly pursued, yet 'tis a Misdemeanor in a Judge to grant a new Trial after the Party hath rested so long under a former Trial; and it may be a Question, whether any Court can grant a new Trial to be had before themselves: There cannot be a New Trial at Bar as there may at Nisi prius, for in the last Case 'tis but reasonable, that the Court should judge how the Judge of Nisi prius has executed his Authority.

Judges of an inferior Court granted a New Trial after a second Scire facias was brought against the Bail.

(8.) Covenant was brought by the Plaintiff in Hampshire, for not repairing a House in Berkshire, and Issue being joined upon Non infregit conventionem, the Cause was tried in Hampshire, and the Plaintiff had a Verdict, but could never get Judgment; for per Curiam, this is a Mis-trial, because this being a Special Issue, nothing can be given in Evidence but the not Repairing in Berkshire, especially since the Suit is between the very Parties to the Deed, and not between Assignees.

Sid: 157. Of a Mis-trial in an improper County.

Sid. 325.
1 Lev. 208.
Trial good,
if by the
County
where the
Matter in
Issue doth
arise.
Postea II. S. P.

(9.) Debt upon Bond, the Action was laid in London, and the Condition was, for Performance of Covenants in an Indenture, by which a Walk, called Shrubwalk, in the County of Northampton, was granted, &c. and the Venue was of Shrubwalk, and the Cause was tried in Northampton; and after a Verdict for the Plaintiff it was insisted, that here was a Mis-trial, because the Venire facias could not come from a Walk in a Forrest, which is only an Office of Liberty: Sed per Curiam, this being tried by a Jury where the Matter in Issue did arise, 'tis within the Statute 16 & 17 Car. 2. cap. 8. 'tis true, the Words of that Statute are, (viz.) It shall be good, if tried by the County where the Action is laid, but that must be understood by the County where the Matter in Issue doth arise; for otherwise it would destroy the whole Law concerning Juries, to try it in a County foreign to the Issue, as it may, if tried in the County where the Action is laid.

Sid. 60, 118.
Where the
Plaintiff
may lay his
Action in
what County
he will.

(10.) The Plaintiff was Apprentice to the Defendant, who covenanted to instruct him in such a Trade, and for not performing it, an Action of Covenant was brought and laid in Middlesex; the Defendant pleaded a Departure out of his Service in London; and upon a Demurrer to this Plea it was insisted for the Defendant, that the Venue ought to be from London, where the Departure was, and the rather, because the Cause of Action in Middlesex was admitted by the Demurrer: Sed per Curiam, in personal Actions, and in such which are transitory, the Plaintiff may lay his Action in what County he will, and the Jury ought to find all local Acts, tho' in another County.

Antea 9. S. P.

(11.) Covenant, and the Action was laid in London, and Issue was joined upon a Feoffment in Oxfordshire, of Lands in that County, and the Cause was tried in London; after a Verdict for the Plaintiff it was moved in Arrest of Judgment, that this was a Mis-trial, because a feoffment of Lands in Oxfordshire is local, and therefore the Cause ought to have been there: Sed per Curiam, this is helped by the Statute 17 Car. 2. being tried in the County where the Action was brought.

5 Mod. 405.
Where a
wrong Venue
is aided by
the Statute.

(12.) Covenant for not repairing a House in Chester, the Defendant pleaded reparavit, upon which they were at Issue, and the Venire facias was from the County of Chester at large; after a Verdict for the Plaintiff it was objected, this was a Mis-trial, for the Issue being local, (viz.) at Chester generally, and the Trial being in the County of Chester at large, it was by a Jury of a wrong County: And per Curiam, this is not aided by any Statute, but only a wrong Venue in a proper County, as if the Issue is at Islington in Middlesex, and the Venue is of Hampsted in the same County, that is Right, but the Venue is Wrong, and that is aided.

T R O V E R.

(1.) **I**n Trover, the Plaintiff declared for ten Pair of Curtains and Vallance, good, without shewing the Kind and Quantum of Stuff, and so it is of any such artificial Things. 2 Saund. 74i

(2.) It lies de Denariis, tho' out of a Bag, for the Action is not to recover the Money, but the Damages. 1 Cro. 89.

(3.) It lies for a Spaniel, but not for an Hawk unless reclaimed, and the Reason is for Want of Property, and therefore the Plaintiff always proves a Property in himself and a Conversion by the Defendant. 1 Mod. 243.

(4.) Trover for an Horse, the Defendants justify the Taking as a Distress for Toll; naught upon a Demurrer, because the Conversion is not answered, for a Distress is no Conversion. Hutt. 10.
Hob. 187.
S.C.
10 Rep. 40i

(5.) Troder, &c. for 100 Sheep, the Defendant justified under a Fieri facias, by Vertue whereof he took them in Execution: Et per Curiam, upon Demurrer this was adjudged ill, because this Plea doth not answer the Conversion, he should have pleaded Not guilty, and given this Matter in Evidence at the Trial.

(6.) Trover against Husband and Wife, the Plaintiff cannot declare of a Conversion by the Husband and Wife, to the Use of the Wife, or to the Use of the Husband and Wife.

(7.) But he may declare of a Conversion by the Husband and Wife, to the Use of the Husband, or that the Wife converted the Goods to the Use of a Stranger, but not to her own Use, or that she converted them to the Use of her and her Husband.

(8.) Where the Defendant comes to the Possession by finding, in such Case Denial is a Conversion; but if he had the Goods by Delivery, there Denial is no Conversion, but Evidence of a Conversion; now in both those Cases the Defendant had a lawful Possession, (viz.) either by finding or by Delivery, and where the Possession is lawful, the Plaintiff must shew a Demand and a Refusal, to make a Conversion.

But if the Possession was tortious, as if the Defendant takes away the Plaintiff's Hat, there the very Taking is a sufficient Proof of the Conversion.

Fuller

Fuller *versus* Smith. Mich. 8 Will. III. B. R.

Conversion
is the Gift of
the Action.

(9.) **I**N Trover, the Plaintiff declared of a Finding by ten Persons, and that nine of them converted the Goods; upon Not guilty pleaded, the Plaintiff had a Verdict and Judgment in C. B. but upon a Writ of Error in B. R. the Judgment was reversed, because the Conversion is the Gift of the Action, for if a Man finds Goods, 'tis lawful for him to take them up.

Benbrigg *versus* Day. Hill. 3 Will. III. B. R.

Where the
Plaintiff
may take se-
veral Da-
mages, and
release them
as to one
Thing which
is uncertain.

(10.) **T**Rover for several Things, and amongst the rest pro duobus falcis, and upon a Demurrer to the Declaration, for that falcis was an insensible Word: Holt Ch. Just. would not abate the Declaration, because he said that the Plaintiff might take several Damages as to the other Things, and might release them as to this Word, and so take Judgment for the rest.

Hartford *versus* Jones. Mich. 10 Will. III. B. R.

² Salk. 654.
Upon ano-
ther Point.
What Plea is
good in Tro-
ver, what
not.

(11.) **I**N Trover and Conversion, the Defendant may plead Not guilty, and give in Evidence, that he distrained the Goods, and detained them till he was paid, but he cannot plead specially, that he took the Goods by Distress, or that he detained them as Host till paid for the Horses standing, & sic de similibus, for the Conversion is lawful, and none is confessed; but if he pleads a Matter which confesses a Conversion, and avoids it, as the Case is in * Yelverton; 'tis good per Holt Ch. Just. and so it was adjudged in this Case.

¹ Vent. 211.

(12.) Trover de duobus Centenis plumbis Uræ, Anglice, Two hundred Tun of Lead Ore, it was objected, that Centena was properly an Hundred in a County: Sed per Curiam, 'tis good, as here with an Anglice, so 'tis de duobus ponderibus Casei, Anglice, two Weights of Cheese; so 'tis de duobus oneribus Cupri, Anglice, two Horse-Loads of Copper, for these Words are to be understood according to the Subject Matter.

² Saund. 74.

Sid. 98.

² Vent. 78.

(13.) In Trover, the Plaintiff declared for ten Pair of Curtains and Vallance, good, without shewing the Kind and Quantum of the Stuff, and so 'tis of such artificial Things; but Trover for Planks, unless the Plaintiff sets forth how many, is not good; but for Planks in his Granary, or for Books in his Study, is good.

(14.) In Crober for Letters Patents of Wine-Licence, after a Verdict for the Plaintiff, it was objected, that Letters Patents are a Record, and there cannot be a Conversion of a Record. Sed per Curiam, the Letters Patents in the Declaration are only an Exemplification of those under the Great Seal, for which Crober lies, and they may be converted. Hardr. 111.

T R U S T.

(1.) **T**HE Father sold the antient Estate of the Family, and with the Money purchased a new Estate in his and his Son's Name; the Father devised the Lands to his Grandson, and died, the Devisee pretending, that the eldest Son, who joined in the Purchase with his Father, was only a Trustee. Sed per Curiam, Where the Purchase is to the Father and Son, he shall never be taken to be a meer Trustee, unless so expressly declared, but it shall be intended as an Advancement of the Son, especially if he is not otherwise advanced, or left unprovided; and it was the antient Way to join the Son in all Purchases to prevent Wardship. Ch. Rep. 25.
2 Ch. Rep.
231.
Where the Son is joined with the Father in a Purchase it shall be intended for his Advancement.

(2.) Where a Trustee is to pay Debts, Legacies, or Portions out of the annual Rents, Issues, and Profits of the Estate, he cannot alien or sell to raise the Money, unless 'tis to be paid at a certain and prefixed Time; and if the annual Profits will not do it within that Time, then he may sell, for 'tis within the Intention of the Trust. Ibidem.
Where Money is to be paid out of the Profits, &c. the Lands cannot be sold.

(3.) The Testatrix made W. R. her Executor, and gave all her Estate real and personal for the Payment of her Debts and Legacies, and amongst other Legacies she gave 200 l. to her Uncle, who was heir at Law; per Curiam, this is a Devise of the Lands to W. R. in Fee, and no implied Trust in him for the Benefit of the heir, as to the Surplus, after Debts and Legacies paid; for if that had been intended by the Testatrix, then the Devise of 200 l. to him had been to no Purpose. Devise of all her real and personal Estate is a Devise in Fee. Ibidem. 197.

(4.) The

1 Ch. Rep.

225.

See 266.

Where the Wife assigns her Term before Marriage, the Husband can never charge it.

(4.) The Wife having assigned her Term before Marriage, the Husband mortgaged the Trust. Et per Curiam, where a Term is settled in Trust for a Jointure, or in Pursuance of Marriage Articles, or if it be the Term of the Wife, and assigned by her before Marriage, the Husband can neither charge, dispose or forfeit it by Outlawry, and this hath been the constant Course in Chancery since Queen Elizabeth's Reign; but if the Assignment is made after Marriage in Trust for the Wife, 'tis then voluntary and fraudulent.

Hard. 495.

Trust of a Fee-simple or Tail, is forfeited by Treason.

(5.) A Trust of a Fee or Tail is forfeited by Treason, but not by Felony; for such Forfeiture is by Way of Escheat, and an Escheat cannot be but where there is a Defect of a Tenant, but here is a Tenant.

V A R I A N C E.

Raym. 398.

Variance, where 'tis amendable by the Statute 16 & 17 Car. 2.

(1.) **I**n Ejectment for a Messuage, with the Appurtenances: Upon Not guilty pleaded, the Plaintiff had a Verdict, Quoad parcellam Messuagii jacen' next the Messuage of F. Neev, and the Judgment was, that the Plaintiff recover the Term of and in Parcel of a Messuage lying next the Messuage in the Occupation of F. Neev, so that the Verdict was for a Messuage next the Messuage of F. Neev, and the Judgment was for a Messuage next another Messuage, in the Occupation of F. Neev; now admitting this is a Variance 'tis amendable by the Statute 16 & 17 Car. 2. cap. 8. (viz.) The Words are, All such Omissions, Variances, Defects, and other Matters of like Nature, not being against the Right of the Matter of the Suit, shall be amended: But a Messuage of F. Neev, and a Messuage in the Occupation of F. Neev, seems to be no material Variance.

Postea, 9. S. P. Variance between the Writ and Declaration.

(2.) In Replevin for taking averia, and the Writ and Declaration were both for taking Averia, (viz.) a Mare; and upon a Demurrer it was objected, that a Mare could not be averia; and for this Variance between the Writ and the Declaration, the Defendant had Judgment. 2 Lutw. Ginn's Case.

(3.) Error to reverse a Judgment in C. B. in Ejectment, the Writ was abated, for that it was to remove the Proceedings between W. R. and W. W. of the City of Excester, in the County of the City, and a Blank was left for the Addition, and the Record certified was, that W. R. of North Moulton in the County of Devon Yeoman, was attached to Answer W. W. Clerk; and for this Variance between W. R. in the Writ, and W. R. with the Addition in the Record certified, it was abated.

Sid. 103.
Between the
Writ of Er-
ror and Re-
cord certifi-
ed.

(4.) Error to reverse a Judgment in C. B. in Trespass, the Writ was W. R. de, &c. in Com. Warwick, and the Record certified was W. R. de, &c. in Com. Lincoln. Per Curiam, 'tis a material Variance, and by Reason whereof the Record was not removed.

Sid. 193.
Between the
Writ of Er-
ror and Re-
cord certifi-
ed.

(5.) Writ of Error in the Exchequer-Chamber to remove a Record out of B. R. of a certain Trespass the Husband and Wife had done, and the Record certified was of a Trespass done by the Woman alone, and for this Variance the Writ was abated.

Sid. 269.
Between the
Writ of Er-
ror and the
Record cer-
tified.

Burr *versus* Atwood. Mich. 1 Annæ.

(6.) **T**HE Plaintiff obtained Judgment in a Scire facias upon a Recognisance against the Bail, and now upon a Writ of Error brought, it was Quod in adjudicatione executionis Judicii prædicti Error intervenit manifestus, &c. adjudged this was naught, it should have been in adjudicatione executionis Recognitionis prædicti, because a Recognisance is not such a Judgment as might or would be intended on the Face of the Writ of Error

Writ of Er-
ror in which
the Judg-
ment was
misrecited.

King *versus* Ewer. Pasch. 1 Annæ B. R.

(7.) **I**n a Scire facias upon a Recognisance removed by Certiorari, and upon Oyer entred in hæc verba, the Condition of the Recognisance recited in the Scire facias was, that the Defendant should give Notice of Trial Prosecutori Et ejus Clerico, whereas the Recognisance it self was, Prosecutori Aut ejus Clerico; and per Curiam, this is a Variance and quite different, so the Defendant had Judgment.

Where *Et*
instead of
Aut was re-
cited in the
Scire facias.

Anonymus. Pasch. 5 Will. III. B. R.

Between the
Original and
the Declara-
tion.

(8.) **I**N Trespas and Battery brought against Husband and Wife, the Original as it was recited in the Declaration was of a Battery only at one Time, but the Declaration it self was of several Batteries done by them at several Times. And the Defendant pleaded to the several Batteries, but the Plaintiff replied only as to one of them, and at the Trial had a Verdict, and upon a Motion to set it aside for this Variance, per Curiam, The Original being recited in the Declaration, but not set out upon Oyer craved, it shall be intended to be Right, but misrecited in the Top of the Declaration; and the Plaintiff's not Replying to the other Batteries is but a Discontinuance, which is helped by a Verdict.

Anonymus.

Antea, 2 S.P.

(9.) **I**N Replevin, The Writ was Quare cepit averia, and the Declaration was Quare cepit unam equam. Et per Powell, This Variance between the Writ and Declaration, is naught even after a Verdict, which Treby Ch. Just. denied; 'tis true 'tis naught upon a Demurrer, but 'tis cured by the Oxford Act after a Verdict.

VENIRE FACIAS.

(1.) **A** Venire facias ad respondendum may be without a Day certain, because by an Appearance the Fault in this Process is aided, but a Venire facias ad triand' exitum, must be returnable on a Day certain. Sid. 100.

(2.) Upon an Indictment before Justices of Peace in their Quarter-Sessions, or before Justices of Oyer and Terminer, there must be fifteen Days between the Teste and Return of the Venire facias; but if the Entry be ex assensu Partium, then the Venire facias may be returnable immediate before the Justices of Peace, &c. 1 Cro. 583.
Sid. 99.

(3.) But before Justices of Oyer and Terminer and Gaol-Delivery, an Indictment may be found and tried the same Day, for they may award a Venire facias returnable immediate, and so may the King's Bench for all Offences done in Middlesex, that being the County in which that Court sits, but not for Offences done out of that County, because as to such 'tis not a Court of Oyer, &c. 1 Cro. 448.
Style 28, 29.

(4.) Where an imperfect Verdict is given in an Assise, the same Recognitors may be re-summoned by Certificate of the Assise to explain that Verdict, because this is festinum Remedium, but in all other Cases, where the Jury come in by Process judicial, if an imperfect Verdict is received and recorded, no alias Venire facias or Nisi prius will lie for the same Jury, but there must be a Venire facias de novo; 'tis true if a Jury is discharged upon a Demurrer to the Evidence, and without giving any Verdict, there an alias Venire facias will lie for the same Jury, but where a Verdict is set aside, there must be a Venire facias de novo, because the same Jury cannot stand indifferent to try the same Cause again. 3 Cro. 33.
8 Rep. 66.
Allen 18.

(5.) A Venire facias de Vicineto Villæ, &c. is good in a superior Court, because their Jurisdiction is general, but 'tis not so in an inferior Court, because their Jurisdiction is circumscribed to the Will only, therefore the Venire facias must be de Villa, and not de Vicineto Villæ, but this is contradicted by the later Authorities, for it shall be intended, that their Liberty extended beyond the Will. Noy 66. in
Gresnan's
Case.

* Jones 171.
Latch 208.

V E R D I C T.

Vaugh. 111,
117.
Uncertain
Verdict.

(1.) **I**N a Special Verdict in Trespas brought against Sir Rich. Cox Baronet, Rich. Cox Esq; and others; upon Not guilty, the Jury find a Warrant of a Justice of Peace, commanding the Constable to arrest the Plaintiff, virtute cujus he was arrested, and that the Constable required the other Defendants to assist him to convey the Plaintiff before a Justice of Peace, and that they brought him to the Constable's House, and that prædict' Richardus Cox Miles, sent for the Constable, and commanded him to put the Plaintiff in the Stocks, whereas there was no such Person as prædictus Richardus Cox Miles, before-mentioned in the Record: Et per Curiam, this made the Verdict very uncertain.

Sid. 203.

(2.) The Jury were charged at the Assizes with an Issue concerning a Copyhold, and one of them, after they were gone from the Bar, had a Court-Roll, and told the rest, that he knew the Matter, and that it was for the Plaintiff, but the other Eleven being of another Opinion before they saw the Roll, left the Matter to this Juror, and so they brought in a Verdict for the Plaintiff, but it was set aside, and a new Trial granted.

Cattle & al' *versus* Andrews. Hill. 5 Will. III.
Rot. 826.

Not guilty
as to Part,
and they
gave no Ver-
dict as to the
rest.

(3.) **E**rror of a Judgment in C. B. in an Action of Trespas, wherein the Plaintiff declared against the Defendant for several Trespases, (viz.) for Breaking and Entering his Close, Treading down his Grass, and Taking and Carrying away Water; the Defendant justifies as to all, upon which they were at Issue, and the Jury found him Not guilty as to the Treading, but gave no Verdict as to the other Matters, this was adjudged naught, and for this Cause the Judgment was reversed.

1 Instit. 227.

Anonymus. Hill. 1697. at Guildhall, coram Holt
Chief Justice.

(4.) A Sumplis against two, and there was Judgment by De- Where the
fault against one of them, the other pleaded Payment Defendant
in Satisfaction of the whole Debt, but at the Trial proved only confesseth
Payment of his Share: Et per Holt Ch. Just. if the Jury find a the Action,
Discharge only as to this Defendant, they must find for the the Finding
Plaintiff, and so they must, tho' they find the Payment was for of the Jury
the whole Debt, because the other Defendant hath confessed the will not dis-
Action, and the finding of the Jury cannot discharge him, charge him.
which was done accordingly, and small Damages given.

(5.) Verdicts shall not be taken so strictly as Pleadings, but the Jones 28, 61.
Substance of the Thing in Issue ought to be always found.

(6.) In all Cases and in all Actions the Jury may give a Ge- Where the
neral or Special Verdict, as well in Causes Criminal as Civil, Jury may
and the Court ought to receive it, if pertinent to the Point in give a Gene-
Issue, for if the Jury Doubt they may refer themselves to the ral or Spe-
Court, but are not bound so to do. cial Verdict.

(7.) Where the Action is grounded on the Contract, if the Variant from
Party mistakes the Sum, he fails in his Action, as for Instance, the Declara-
if he declare for an Oxle of 20 l. and the Evidence is, that the tion.
Oxle was sold for 10 l. or for twenty Marks, in such Case the
Plaintiff shall not recover, because 'tis upon another Contract.

(8.) But 'tis otherwise if the Plaintiff declare upon a Promise 2 Cro. 380.
in Law, or where the Action is grounded on a Tort, as if an Cro. Eliz.
Action of Debt is brought for the Escape of the Husband and 147.
Wife, and the Jury find, that the Wife only was in Execution Moor 466.
and escaped, the Plaintiff shall have Judgment. Sid. 5.
2 Vent. 151,
223.

(9.) Case, &c. in which the Plaintiff declared, that the De- Allen 28.
fendant was indebted to W. R. in 40 l. who became a Bankrupt, Baker's Case.
and that the Commissioners assigned Debts in quodam Scheda
annex' continen' præd' summam 40 l. to the Plaintiff, whereby the
Defendant became indebted to the Plaintiff in 40 l. and being so
indebted, promised to pay, and upon the Evidence the Jury found
the Defendant was indebted to the Bankrupt in 30 l. only, so
that the Sum of 40 l. for which the Plaintiff had declared, was
never assigned to him, nor promised to be paid; but adjudged,
that it was no worse in the Plaintiff than if the Bankrupt him-
self, before he became Bankrupt, had brought the Action; and
the

the Difference is between an Action on a Promise in Law as in the principal Case, and an Action brought upon the Contract it self; for in the first Case, a Mistake in the Sum doth not hurt, but in the other Case it doth.

Where Part of the Issue is only found, and finding, but not pursuant to the Issue.

1 Inst. 227.
Cro. Eliz.

133.

Dyer 75.
Allen 31.

(10.) A Verdict, which finds Part only of the Issue, is void as to the Whole, as for Instance, an Information was brought for intruding into one Messuage and an Acre of Land, and the Jury found the Defendant Not guilty as to the Land, and said nothing of the Messuage, this was adjudged ill as to the Whole.

(11.) Case, &c. for saying the Plaintiff had the French Pox, and that he was, &c. the Jury find all the Words in the Declaration, except those, That he had the French Pox, adjudged ill for that Reason.

Sid. 99.

(12.) So where the Defendant was indicted for a forcible Entry and Detainer, the Jury found the Entry peaceable, but said nothing as to the Detainer; but if they had found the Entry peaceable, and the Detainer by Force, it had been good.

(13.) But where the Defendant was indicted for forging and publishing, and he was found guilty de transgressionibus, and of the Forgery aforesaid, tho' nothing was said of the Publishing, yet the Verdict is good, because the Word de transgressionibus prædict' includes it.

2 Lev. 111.
Rex v. Norton.

(14.) So in Trespass for an Assault and Battery, and the Jury found the Defendant guilty de transgressionibus, and Assault, and said nothing as to the Battery, adjudged good, for the Word Transgressio includes the Battery.

Sid. 234.

(15.) Action of the Case for Words, upon Not guilty pleaded, the Jury found that the Defendant non locutus est verba, &c. adjudged ill.

(16.) So in Trespass, upon Not guilty pleaded, the Jury found, that the Plaintiff non damnificatus fuit, this is ill, because it doth not answer the Plaintiff's Charge.

Yel. 78, 79.

(17.) So in Assumpsit, and Non Assumpsit pleaded, the Jury found, that the Plaintiff was damnified 10 l. by the Defendant's Non-performing his Promise; this is ill, because it doth not directly Answer the Issue, but by Implication.

1 Roll. Rep.
257. Baugh's Case.

(18.) So if the Issue be solvit ad diem, &c. and the Jury find quod debet, 'tis ill.

(19.) The Defendant pleaded plene Administravit, and the Jury found that he had Goods in his Hands, but did not find to what Value, adjudged ill; because the Plaintiff must recover according to the Value of the Assets found; but if Action of Debt is brought against an Heir, and he pleads Reins per Descend, and the Jury find that Lands in Fee descended to him, but not to what Value, the Verdict is good, because a General Judgment shall be given, and not according to the Value of the Land.

Uncertain and imperfect, and where more or less is found.
1 Roll. Rep. 274. Brett's Case.

(20.) Trespass against Husband and Wife, in which the Plaintiff inter alia declared, that they beat his Mare: Upon Not guilty pleaded, the Jury found, that the Wife did beat the Mare, and as to the Residue, &c. they found for the Defendant; adjudged, that this was an imperfect Verdict as to the Husband, for it neither acquits or condemns him, for the Finding as to the Residue, extends only to the other Trespasses.

Yelv. 106.

(21.) A Verdict found, that W. R. the Copyholder did bargain and sell to the Lord of the Manor, all the Lands which he purchased of W. W. and did not find what Lands, or that they were purchased of W. W. and for that Reason adjudged ill.

Jones 42. Blenerhasset's Case.

(22.) In Trespass, the Defendant pleaded a Custom, &c. which being traversed by the Plaintiff, the Jury found the Custom Specially, but Variant from that which was pleaded, concluding their Verdict, quod, si super totam materiam, &c. they find the Defendant guilty, si aliter, &c. then they find him Not guilty. Et per Curiam, a Venire facias De novo was awarded, because there was no Verdict found upon this Issue, there being no Conclusion upon the Point in Issue.

Cro. 37 Eliz. 415. Boraston's Case.

(23.) In a Quare Impedit a Special Verdict found an Instrument under the Seal of the Bishop with this Indorsement (viz.) A Resignation was acknowledged and accepted by the Bishop; adjudged this was not a Finding a Resignation in Fact, but only Evidence of a Resignation; so if instead of Finding a Feoffment the Jury should find there was a Charter and Livery indorsed; 'tis ill.

Noy 147. Smith v. Fowkes.

(24.) A Verdict, which finds more than is in Issue, is void quoad that, because 'tis not within the Charge or Commission of the Jury; as for Instance, if a Man bring an Action of Debt, Where a Verdict finds more than is in Issue, 'tis void.

Debt, and declares for 20l. and the Jury, upon nil debet pleaded, find, that the Defendant owed 40l. this is ill, for the Plaintiff cannot recover more than he demands, and in this Case he cannot recover what he demands, because the Court cannot sever their Judgment from the Verdict.

3 Lev. 55.

(25.) In Trespas for taking his Gown and Manteau a Special Verdict found, that the Defendant as Constable took the Gown for a Tax, but found nothing as to the Manteau; per Curiam, this is a Discontinuance as to the whole.

Hard. 166.

(26.) Assault and Battery by Husband and Wife; Upon Not guilty pleaded, the Jury found, that the Defendant was guilty as to Beating the Wife, and nothing was said of the Husband. Et per Curiam, This Verdict is void, because only Part of the Issue was found.

Sid. 357.

(27.) In an Action of Debt for Rent, the Defendant pleaded, nil debet modo & forma prout, as the Plaintiff had declared, upon which they were at Issue, and the Verdict found, quod nil debet modo & forma, as the Plaintiff had declared; and upon a Writ of Error brought, this was assigned for Error, to make the whole Verdict void, for the Plaintiff did not declare, that Nil debet modo & forma, &c. he declared, Quod debet. But per Curiam, the modo & forma, and what follows, shall be rejected, and so nil debet shall stand alone to make the Verdict good.

Vicar and Vicarage.

(1.) **A**T Common Law the Vicar had no Freehold, and so it continued till 9 Ed. 3. which gave him a *juris utrum*, and therefore it hath been held, that Lands might be given by the Rector to the Vicar, because the Freehold still continued in the Rector; but a Stranger could not give Lands to the Vicar, because in such Case he would have a Freehold, and that would be in Mortmain. Vicar, where he had no Freehold.

(2.) And as to this Matter there is a remarkable Case, Anno 40 Ed. 3. 29, 30. ff. A Vicar brought a *juris utrum* of a Carve of Lands, to try whether it was the Freehold of the Vicar, or the Lay Fee of the Prior, the Defendant pleaded, that he was Parson of the Vicarage, and prayed Judgment if the Court would take Cognizance of this Matter; and it was objected, that the Vicarage being derived out of the Rectory, and that by the Act and Concurrence of the Ordinary; and it being a Thing so far depending on the Ordinary, that he might either decrease the Vicarage and add to the Rectory, or decrease the Rectory and add to the Vicarage, that the Endowment of the Vicarage and how much belonged to it was a Spiritual Thing, and belonged to the Ordinary; that one Parson cannot give to another Parson without Licence. Sed per Curiam, the Thing in Demand is a Matter of Freehold, which cannot be tried by the Ordinary, especially, there being a Warranty and the Act of a Stranger in the Case; 'tis true, heretofore it was held, that a Vicar could not maintain an Action against the Rector, but that was when the Vicar had no certain Estate in his Possessions; but now the Law is altered, for the Vicar is endowed to him and his Successors in Sebealty, which is a fixed Estate, and therefore he may maintain an Assise against the Rector, as well as against a Stranger; and it may be that the Lands in Question were not derived from the Rectory, and assigned by the Ordinary to the Vicarage, but given and annexed to it by a Lay Stranger. Vicarage endowed.

(3.) As concerning a Rectory, 'tis an aggregate Inheritance, and must consist of Lands as well as Tithes, there must be the Church and Churchyard at least, and therefore where the Plaintiff declares of a Rectory, he must prove more than Tithes; but yet a Rectory may be without Glebe, for the Rector may have con-

What is the
Glebe.

veyed away his Glebe, and there are many Compositions between the Rector or Vicar, by which all the Tithes and Glebe are conveyed to the Vicar, reserving only a Rent to the Parson, and the Glebe originally considered was only an Additament ex dono fundatoris, and the Common Law upon the Creation of a Parson, gives him nothing but the Tithes.

Smith *versus* Waller. Trin. 12 Will. III. B. R.

Vicar is
endowed out
of the Rec-
tory.
Vent. 15.

(4.) **W**here the Vicar is endowed, and comes in by Institution and Induction, he hath curam animarum actualiter, and is not to be removed at the Pleasure of the Rector, who in this Case hath only curam animarum habitualiter; but where the Vicar is not endowed nor comes in by Institution and Induction, the Rector hath curam animarum actualiter, and may remove the Vicar at pleasure; and where a Vicar is endowed, 'tis always out of the Rectory, and by the Act of the Ordinary; therefore where the Question is, whether it be a Vicarage or not, it shall be tried in the Spiritual Court, because it could not begin or be created but by the Ordinary, and with his Concurrence, and so 'tis of an Appropriation.

Lutten *versus* King.

Libel by a
Vicar to have
his Vicarage
augmented.

(5.) **B**Efore the Statute 31 H. 8. a Vicar might libel in the Spiritual Court for an Augmentation of his Vicarage; for upon the Creation of Vicarages, that Power was commonly reserved, and where it was not reserved the Bishop could not augment them, and Libels for that Purpose were frequently exhibited against Impropriators; but now since by that Statute Impropropriations are made Lay Fees, the Ordinary cannot intermeddle, neither could they have sued for Tithes in the Spiritual Court, if that Power was not particularly saved to them by the Statute: But there seems to be a Difference where a Vicar sues a Lay Impropriator, and where the Impropriator is a Spiritual Person, for in the last Case 'tis probable he may sue for an Augmentation; and in some Cases, where the Improppriation is not a Lay Fee, as in the Case of the Choristers of Salisbury, where the Appropriation of a Parsonage was made to them before the Statute, and continues so still, and in such Case the Bishop may make an Augmentation, if that Power is reserved, for the Persons are subject to his Command.

(6.) A Vicar libelled for Tithes of Wood, the Defendant suggested for a Prohibition, that Time out of Mind they had paid no small Tithes to the Vicar, but that by the Custom of the Parish they were paid to the Parson: Per Curiam, if the Endowment of the Vicarage is lost, the Tithes must be paid according to Custom.

1 Mod. 32.
Where the Endowment is lost, the Tithes must be paid according to Custom.

Visitation and Visitor.

(1.) Proxies or Procuracies, so called by the Canonists, because upon every Visitation by the Bishop, the Parson of Church visited were to procure necessary Provisions for the Visitor, and this Provision was originally in esculentis & poculentis, but as our Socage, which was so many Days plowing the Lord's Land, came in Time to be converted into certain Payments of Money, so this Provision was changed into a certain Sum of Money paid to the Ordinary, as being de jure Visitor of all Churches within his Diocese; and being thus settled, it was paid and became due, whether there was actually any Visitation, or not, as that Rent, which the Tenant was to pay in Lieu of his Socage Service, came in Time to be due and demandable, whether the Lord had Demesnes to plough, or not.

What are Procurations.

(2.) These Proxies are now Part of the settled Revenue of the Bishop's See, the King himself pays them for his Appropriations, as the Abbays did before the Dissolution, when they had appropriated Churches.

Procurations are Part of the Bishop's Revenue.

(3.) The Commissary, at his Court of Visitation, cannot cite Lay Parishioners, unless only Church-wardens and Sidesmen, and to these he may give his Articles, and inquire by them.

Noy 123.

(4.) The Archbishop of Canterbury never visits the Diocese of London, this is by Agreement between them; and in Consideration thereof, if a Cause arises within the Diocese of London, and the Suit is brought in the Archdeacon before the Archbishop, tho' this is per Saltum, yet the Bishop of London is to allow it.

1 Cro. 346.
The Archbishop never visits the Diocese of London.

Of Visitors of
Lay Founda-
tions.

(5.) As to Visitors of Lay Foundations, they are either by Appointment of the Founder, or by Implication of Law, those which are by Appointment, are such to whom the Founder delegates that Power.

The Found-
er and his
Heirs are Vi-
sitors.

(6.) By Implication of Law, the Founder and his Heirs are Visitors, if no particular Person is appointed; and this is a Reservation the Law makes to him in Lieu of the Land which he parted withal; and as the Foundation is a Creature of his own, so 'tis reasonable, that it should be visited by his Heirs, to see that the Charity of their Ancestor is not perverted.

(7.) Corporations aggregate and instituted for private Charity, if they are Lay, they are visitable by the Founder, or by whom he appoints, and from the Sentence of such Visitor there lies no Appeal.

(8.) But if Spiritual, 'tis visitable by the Ordinary, and from his Sentence an Appeal lies. Show. 46. Quare.

V I S N E.

Wilson *versus* Laws. Pasch. 6 Will. III. B. R.

¹ Salk.
¹ Roll. Rep.
²⁸.
Moor 559.
³ Cro. 282,
898.
² Inst. 319.

(1.) **I**N an Appeal of Murder, it was objected, that the Fact was laid in the Parish of St. Giles in the Fields, when it should be in the Vill, as it ought to be in the Statute of Gloucester: Sed non allocatur, for the Parish shall be intended a Vill, and there is no Difference between a Parish and a Vill: 'tis true, a Parish may contain more Vill than one, but that shall not be intended, unless shewn.

Booth *versus* Johnson. Hill. 1 Annæ.

- (2.) **W**here the Plaintiff in his Declaration lays the Visne in Gray's Inn or Whitehall, which are no Vills, yet after a Verdict or Demurrer they shall be intended to be Vills, and therefore, if the Defendant will take any Advantage, he must plead no such Vill as Gray's Inn, &c.

Where a Place which is no Vill shall be intended to be a Vill, after a Demurrer or Verdict.

The Queen versus Inhabitants of Wilts. Trin. 3 Annæ.

- (3.) **I**n an Information against the County of Wilts, for not repairing Laycock Bridge, the Court held that the Attorney General might take a Venire facias to any adjacent County; and that it might be de corpore of the Whole, or de Vicineto of some particular Place therein next adjoining.

Way versus Gally. Trin. 3 Annæ, B. R.

- (4.) **T**he Lessor brought an Action of Debt against the Lessee for Rent, upon a Demise of Lands in Jamaica, and laid his Action in London; the Defendant pleaded, that the Lands were in Jamaica, and that there are Courts there, &c. adjudged upon Demurrer that this Plea is ill; but if in any Action laid here, a local Issue should arise (as suppose in Ireland) it may be tried in the County where the Action is laid, according to Dowdale's Case, or a Suggestion may be entered on the Roll, that such a Place in such a County lies next to Ireland, and so have a Jury from thence.

Mod. Cases 194.
2 Salk. 651;

* 6 Rep. 46;

Anonymus.

- (5.) **R**uled, that the Want of a Venue is only curable by such a Plea which admits the Fact for the Trial whereof it was necessary to lay a Venue: The Plaintiff declared on a Bond, and laid no Venue, the Defendant pleads a Release, now by this Plea the Want of a Venue is cured; aliter if he had demurred; quære, if he had pleaded *Non est factum*.

Where the Want of a Venue is cured.

U N I O N.

U N I O N.

Tho' by an Union both Churches are one Parish, yet as to Taxes and Repairs they are several.

Who may make an Union.

(1.) **B**y an Union, both Churches become one, and one Parish, one Benefice and one Advowson, but as to Taxes and Repairs, they are several, for otherwise it might be prejudicial, because the old Church may be less in Proportion than the New, to which 'tis united.

(2.) Where the Churches are poor and void, the Patron and Ordinary might make an Union without the King, but not if they were rich; for an Advowson lying in Tenure, the King hath a Possibility of an Escheat, Lapse, &c. which could not be lost without his Consent.

(3.) If the Church is full, then both Parson, Patron, and Ordinary must consent to an Union.

3 Cro. 719.

(4.) In a Quare Impedit, the Defendant pleaded a Dispensation for two Benefices, and upon Oyer of the Letters Patents of Dispensation, it was thus:

The Form of an Union.

(5.) **N**. It took Notice, that there were two Benefices, and of small Value, therefore Unimus, incorporamus & anneximus the one to the other, for the Life of W. R. the present Incumbent; it was objected, that here were no Words of Dispensation, and therefore this Clause cannot enure as a Dispensation, neither can it be an Union, because 'tis done by the King alone, without the Concurrence of the Patron and Ordinary: Sed per Curiam, tho' there cannot be a perpetual Union without such Concurrence, because 'tis a Loss both to Patron and Ordinary, yet there may be a temporary Union, as in this Case, for the Life of the Incumbent, and this might be done by the Metropolitan alone; for after the Death of the Incumbent, the Union is dissolved, and no less accretes, either to the Patron or Ordinary in the mean Time, for the one hath his Presentation and the other his Admission, and this is a compleat Dispensation, and allowed by the Statute 31 & 37 H. 8. cap. 21. (viz.) Any License, Union, or Dispensation to the contrary.

UNIVERSITIES.

(1.) **O**Ctoginta Damæ apud actum Oxford' dat' cla. 19 Ed. 1. Memb. 6. v. 3.

(2.) Strata Civitatis mandat' per breve Regis emendari per Burgenſes Oxon' & quod porcuaria deſtruantur. Clauf. 29 Ed. 1. Memb. 14. D. 2.

(3.) Breve Regis ne juſta & alia facta armorum fiant prope Oxon' ne quies Scholar' impediatur. Clauf. 33 Ed. 1 Memb. 2. D. 1. Memb. 3. v. 2.

(4.) Breve Majori & ballivis Oxon' de Affiſa panis & vini obſervand' & de rationabili precio ſuper viſtuala imponend' ſicut per Juramentum Cancellario & Procuratoribus aſtringuntur. Clauf. 3 Ed. 1. Memb. 18. D. 2.

(5.) The Univerſity of Oxford hath Jurisdiction in all Trefpaſſes, Injuries, Quarrels, Crimes and Matters whatſoever which do not concern Life or Freehold. Where they have Jurisdiction, and where not.

(6.) But an Ejectment for the Right of a Chattel real ; as for Inſtance, of a Leaſe for Years ſhall not be determined there, for tho' a Freehold is not recovered, yet the Land is drawn from him who perhaps might have the Freehold.

(7.) Neither have they any Jurisdiction, unleſs the Plaintiff or Defendant be a Scholar or Servant of the Univerſity, or of ſome College, but if either of them is a Scholar, 'tis then a Matter within their Jurisdiction ; but yet, if either of them is entred into a College by a Trick to avoid a Suit in B. R. or to excuſe himſelf from Town Offices, their Privilege ſhall not be allowed. Cro. Car. 73, 88.
2 Vent. 106.

(8.) The Univerſity demanded Conuſance of a Suit brought in the Exchequer by Quo minus, and it was allowed. Hardr. 505.

(9.) Debt againſt the Defendant, a Townſman in Oxford, for reſuſing to execute an Office in the Corporation : It was moved, that he being a Servant to Dr. Iriſh, might have the Privilege of the Univerſity, and a Charter was produced by which it was 2 Vent. 106.

was granted, that the Members and Servants of the University should be sued in the Vicechancellor's Court, and not elsewhere; and a Certificate from the Chancellor, directed to the Chief Justice, that the Defendant was matriculated and registered in the University; but it appearing to the Court, that this was done two Days, and no more, before he was chosen to this Office, and that he was a Painter by Trade, and had lived several Years in the Corporation, and no Servant attending Dr. Irish, the Privilege of the University was not allowed.

U S E S.

(1.) **U**SES were not at Common Law, neither were they ever mentioned till the Reign of R. 2. and therefore there is no Remedy at Law for them.

1 Rep. 126,
129, 187, 133.

(2.) But yet the Estate and Limitation of an Use ought to be governed and directed by the Rules of Common Law; and there is no Difference between Estates conveyed by Way of Use and by Way of Possession.

(3.) Where a Man intends to pass an Estate at and by a Common Law Conveyance, it shall never take Effect as a Covenant to stand seised, or as a Conveyance upon the Statute of Uses.

1 Inst. 49.

(4.) As for Instance, if by Deed I give, grant and enfeoff my Son, &c. with a Letter of Attorney to make Livery, this shall not enure as a Covenant to stand seised; but it might have been otherwise, if there had been no Letter of Attorney in the Deed.

See *Samms v. Jones*.

(5.) The Father being seised of a Reversion, granted and confirmed the same to his Son, to the Use of himself for Life, Remainder to his Son; without any Attoznmment, this Conveyance is void; yet if there had been no Limitation of the Use, this Deed might have enured as a Covenant to stand seised.

See *Hore v. Dix*.

(6.) So where by Deed between the Father and Son of the one Part, and W. R. of the other Part; the Father did give, grant
and

and enfeof W. R. to the Use of his Son, there being no Livery, this is a void Conveyance.

(7.) Now as to Considerations to raise an Use, the Cases are, if the Conveyance is by Way of Covenant, the Consideration must be either natural Affection or Marriage.

(8.) If 'tis by Bargain and Sale, then the Consideration must be Money.

(9.) Therefore a Covenant to stand seised to the Use of his Son and his Wife, whom he shall marry, this is good.

(10.) But a Covenant to stand seised to the Use of himself for Life, Remainder over, with a Power to let Leases for forty Years to Persons who are Strangers; this is not good as to the Strangers, because they are not privy to the Consideration; but if it had been to make Leases to any of his Children or Kindred, it had been good.

(11.) So a Covenant to stand seised to the Use of A. and B. ^{1 Cro. 530.} and C. his Brother, this is good as to the Brother, and it is entirely in him, but void as to the other two, because not privy to the Consideration.

(12.) In a Covenant to stand seised, the Word Covenant is but declaratory; therefore, if the Father by Deed sets forth, that he stands seised to the Use of his Son, and doth not covenant to stand seised, yet 'tis a good Covenant.

(13.) So if by Deed the Father grants his Lands to his Son in Tail, this is a good Covenant to stand seised. ^{See Buckley v. Simonds.}

(14.) For if the Word Covenant was obligatory, the Deed should not enure as a Covenant to stand seised.

(15.) Therefore if the Father covenants, that his Lands shall go, remain and descend to his Son after his Decease, or that he will convey to his Son, this is not a Covenant to stand seised, for 'tis only obligatory to a future Thing.

(16.) But if the Father covenants to stand seised to the Use of the Son, and to do any Act for farther Assurance, or to levy a Fine to the Use of his Son in Tail, and that if not levied before such a Time, that then he will stand seised to his Use, this shall enure as a Covenant to stand seised.

(17.) It has been already said, that there were no such Things, as Uses at Common Law; the Reason was, because the Feoffee was always taken as the Owner of the Land, and that it was very inconvenient and absurd, that there should be two several Fees, and Owners of the same Land simul & semel, therefore at Common Law the Feoffees to Uses were the very Tenants, and had a Right to forfeit.

(18.) But the Statute to remedy this Inconvenience hath united the Estate to the Use; so that now the Feoffees to Uses have no Estate or Interest at all, but in Respect of the contingent Estates and Uses limited in the Deed.

(19.) And this is neither a naked Authority, nor a meer Estate which they have, but aliquid medium between the Estate and Authority, they have scintilla juris and a possibilitas usus emergentis.

(20.) Some Questions have been made, out of what an Use shall arise; as for Instance, it hath been held, that Uses shall be raised only out of a Freehold, that they cannot be raised out of a Chattel, because that is in Nature of a Trust, nor out of an Use, nor out of a bare Right, nor out of an intended Purchase; as where a Man covenants to stand seised of Lands which he intends to purchase, nor out of such Things which ipso usu consumuntur, as Commons, &c.

Moor 509.]

(21.) But Rents, Liberties and Franchises, and such Local Inheritances, may be granted to Use; but not meer personal Inheritances, as Annuities.

Dyer 10.

(22.) Where a Feoffment is made without express Use or Consideration, there the Use shall be in the Feoffor by Implication of Law; but 'tis otherwise where a Man makes a Gift in Tail, for there is a Tenure, which is a Consideration.

Lamplugh *versus* Shotterell. Pasch. 1 Annæ B. R.

2 Salk. 678.
Farr. 71.
Where an
Use shall re-
sult.

(23.) **T**HE Case was, a Bargain and Sale was made for a Year in Consideration of 5 s. paid, and thereupon a Release to the Bargainee and his Heirs, without expressing any Consideration, the Question was, whether the Use should result to the Bargainor, and it was insisted, that it should not, because the Release doth but enlarge the first Estate, and that is to the Use

Use of the Bargainee, and both are but as one Conveyance, and the 5 s. mentioned in the Lease, extends to the Release, and the Quantum of the Consideration is not material, for a Penny is sufficient; but on the other Side it was argued, that this Conveyance is in Nature of a Feoffment, upon which an Use shall result to the Feoffor where no Consideration is expressed.

(24.) Holt Ch. Just. Before the Statute of * Uses there might * 27 H. 8. be a Reason why an Use should result upon a Feoffment, for it put the Estate out of the Feoffor, and he had only a Trust left which could not be forfeited; and to this Purpose such Feoffments were made, but this cannot be since the Statute; for if an Use must result to the Feoffor, and the Estate must be executed to the Use, the Feoffment is in vain, and the Party hath made a Conveyance to no Manner of Purpose, being in the same Estate as he was before he made the Feoffment; and so it is of a Lease and Release, but it is otherwise upon a fine or Recovery, for they may have their particular Estate in other Respects, as barring upon Nonclaims or Remainders.

So it is if by Feoffment or by Lease and Release, a Man conveys any particular Estate mediate or immediate to another Person, there the Residue of the Estate shall, by Implication of Law, remain in the Party himself; but where no Estate is limited to another, there the whole Conveyance is to no Purpose, if the Party be construed to have the resulting Use in him.

(25.) In a Special Verdict in Ejectment, the only Point was, whether a Lease for a Year, made upon no other Consideration than the Reservation of a Pepper-Corn, shall operate as a Bargain and Sale, and make the Lessee capable to take a Release: Et per Curiam, it shall, for the Reservation of a Pepper-Corn is a sufficient Consideration to raise an Use.

1 Mod. 262.
2 Vent. 35.
2 Mod. 249.
What is a
good Consideration to
raise an Use.

U S U R P A T I O N.

(1.) **A**T Common Law the Patron in Fee was put out of Possession by an Usurpation, and tho' he might recover the Advowson it self by a Writ of Right, yet he had no Remedy for the Presentation hac vice, nor if another Avoidance happen, unless he brought his Writ of Right, and recontinued the Advowson.

(2.) If the Patron had the Advowson in Tail, or for Life, this Turn, and also his whole Advowson was gone.

(3.) If an Usurpation was made upon Tenant by the Curtesy, or in Dower, or upon a Lessee for Years, or upon a Bishop in Time of a Vacancy, neither the Heir or he in Reversion, or Successor, could present at the next Turn, but now this is altered by the Statute, and the Law is,

(4.) That if there be an Usurpation upon a Patron in Fee, he may bring a Quare Impedit for the present Turn, but then it must be brought within six Months, otherwise he is put to his Writ of Right of Advowson.

(5.) But if he is only Patron for Life, and doth not bring his Quare Impedit within six Months, he hath lost his Advowson for ever, for his Interest is discontinued, and he cannot present or maintain a Quare Impedit for the next Turn, being out of Possession, and a Writ of Right will not lie, therefore the Estate in Reversion is discharged of that Interest, but he in Reversion may have a Writ of Right.

(6.) If there is an Usurpation on a Tenant in Dower, or Tenant by the Curtesy or Guardian, and six Months pass after the particular Estates are determined, and the Heir comes of Age, the Heir may maintain a Quare Impedit, or present to the next Avoidance; and if he doth not, then he is put to his Writ of Right.

(7.) And so it is if the Ancestor grant the Advowson for Life or Years, and an Usurpation is made, the Heir may maintain a Quare Impedit for the next Avoidance, as his Ancestor might have done; so it is of a Successor, for a Reversion by Descent,

and a Succession are within the Statute, but a Reversion by Purchase is not.

(8.) Upon the Statute 1 Eliz. if an Usurpation be on a Bishop, it shall bind him, because he suffered it; but his Successor may present to the next Avoidance, or bring a Quare Impedit, tho' he is out of Possession. Jones 46.

(9.) An Usurpation cannot put the King out of Possession of his Land, much less divest an Inheritance out of him, therefore it cannot divest the Inheritance of an Advowson out of him, for nothing can go out of him without a Record, no more than it can come to him.

(10.) But an Usurpation may dispossess him of his Presentation, (i. e.) it may bind his Possession, so as he cannot remove the Incumbent, without a Quare Impedit, tho' it cannot so divest his Estate in an Advowson as to bind his Inheritance and put him to a Writ of Right, &c.

Mugg *versus* Brown. Pasch. 12 Will. III. B. R.

(11.) IF an Incumbent be in by Usurpation on the King, and would be confirmed, he must not procure a new Presentation from the King, because that would be void, the Church being full; but he must get the King's Letters Patents reciting the whole Matter, and therein granting the Church to him: And per Holt Ch. Just. these are called Letters Patents ad corroborandum. 1 Salk. 161. Of Letters Patents ad corroborandum.

(12.) An Usurpation upon a Lessee for Years gains the Fee-simple, and puts the true Patron out of Possession, and tho' by the Statute of Westm. 2. he in Reversion after the Determination of the Lease for Years, may have a Quare Impedit when the Church is void, or may present, and if his Clerk is instituted and inducted, then he is remitted to his former Title, yet till that is done, the Usurper hath the Fee, and the Writ of Right of Advowson lies against him. Hutt. 66. Usurpation on Lessee for Years.

(13.) Quare Impedit, the Defendant pleaded an Usurpation made by the Queen after the Death of the last Incumbent, and that her Clerk was admitted, instituted and inducted, and was in Possession for six Months; the Plaintiff replied and set forth, that the Patron had brought a Quare Impedit against him who was Incumbent upon the Queen's Presentation, and had Judgment against him by Default: And per Curiam, by this Judgment 3 Bulst. 38.

ment the Patron was remitted to his former Right; but it had been otherwise if the Queen had presented on a Deprobation, for there the Patron must have six Months to present after Notice of the Deprobation.

U S U R Y. See Indictment 8.

2 Cro. 677.
Cro. Car. 101.
Noy 143.
2 Vent. 83.
* Noy 133.

(1) **T**here must be a corrupt Agreement for more than Statute Interest, otherwise 'tis not Usury, and the Defendant shall not be punished, unless he * receive some Part of the Money in Affirmance of the usurious Agreement, for 'tis the Receipt and not the Contract which makes him punishable.

(2) Interest upon Bottomry-Bonds, which is *foenus nauticum*, or *Usura maritima*, is not within the Statute.

Mason versus Abdy. Trin. 1 Will. III. B. R.

What is an
usurious
Contract.

(3) **T**HE Obligor was bound in a Bond of 300 l. conditioned to pay 22 l. 10 s. Premium, at the End of the first three Months after the Date, &c. and Six-pence in the Pound at the End of six Months, as a farther Premium, together with the Principal it self, in Case the Obligor be then living, but if he die within that Time, then the Principal to be lost, adjudged this is an usurious Contract, because there was a Possibility that the Obligor might live so long; and there is an express Provision to have the Principal again.

1 Saund. 294:
Where corrupte receipt is
no good Plea.

(4.) Debt upon Bond, dated 24 May, conditioned to pay 300 l. on the 25th Day of February, &c. The Defendant pleaded in Bar, that after the making the said Bond, (viz.) such a Day the Plaintiff corrupte receipt of the Defendant 30 l. for the Use of the said 300 l. for one Year, (viz.) from such a Day to such a Day, which is more than six per Cent. per Annum, contra formam Statuti; and upon a Demurrer to this Plea it was adjudged ill, because the * Statute makes all Bonds void, where Money is * lent upon or for Usury, and where more is taken, than after the Rate of six per Cent. But this Bond doth not appear to be for Money lent upon or for Usury, but for Payment

12 Car. 2.
cap. 13.
* *Postea* 6. S. P.

of a just Debt, and if there is an Usurious Contract * after the Bond made, that shall not affect the Bond to make it void, because it was good at the Time it was made; but by the later Clause of the Statute such an Usurious Contract is punishable by Forfeiture of treble the Value. * Post. 5. P. S.

(5.) Information was brought upon the same Statute, setting forth, that the Defendant 16 Novemb. 20 Car. 2. lent W. R. 20 l. till June following, which is six Months, and that afterwards, (viz.) Ad finem Terminii prædicti, he took of the Plaintiff corrupte & extorsive thirty Shillings for the Loan thereof, which is more than allowed by the Statute: Upon Not guilty pleaded, the Jury found for the Informer; but the Judgment was set aside, because it appears, that this corrupt Agreement was made * ad finem Terminii, when by the Statute it must be at the Time of the Contract made, and if the Contract is not then Usurious, the Assurance is not void; but the Borrower shall have treble the Value, as forfeited by the Statute. Raym. 198.
i Mod. 69.

(6.) Information against the Defendant, for that he on the 30th of May, &c. by Way of Corrupt Contract and Agreement, cepit & ad lucrui sui convertit 40 s. for deferring the Day of Payment of 25 l. from the 29th of July to the 30th of May (which was the Day on which he took the 40 s. contra formam Statuti, after a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that it did not appear by this Information that the 25 l. was Money lent; but if it had 'tis ill, because the Taking the 40 s. was after the Lending, and there was no corrupt Agreement laid either before or at the Lending. Sed per Curiam, if upon this Information Judgment cannot be given on the Statute to pay treble the Money taken, yet being found, that the Defendant took 40 s. by a corrupt Agreement, Judgment shall be given against him at Common Law, which is Fine and Imprisonment. Sid. 421.
Where Judgment cannot be given upon the Statute it shall be given as at Common Law.

(7.) Debt upon Bond conditioned, that in Consideration of 12 l. paid by the Plaintiff to the Defendant, he became bound to pay the said Plaintiff 14 l. if he lived six Months after the Date of the Bond; there was a Plea and Demurrer, and it was objected, that it appears by the very Condition of this Bond, that the Contract was Usurious, it being to pay 14 l. for 12 l. in six Months after the Date of the Bond; 'tis true, this might have made the Bond void, if the Statute had been pleaded, but that not being done, this Objection comes to late. Lutw.
Grange's Case.
Where the Statute was not pleaded, the Bond, tho' Usurious, is good.

(8.) The Distinction in the Books is, that where the Principal and Interest are both in Danger of being lost, there the Contract for extraordinary Interest is not Usurious; but where the Principal is well secured, and the Interest only in Danger, 'tis otherwise. What Contract for extraordinary Interest is good, and what not.

WAY.

W A Y.

Sid. 140.
The Jury
find, that the
Defendants
*reparare non
debent*, but
did not find,
who ought to
repair.

(1.) **I**nformation against the Hundred of Yarnnton, for not repairing an Highway, the Defendants pleaded, that non reparare debent, upon which they were at Issue, and tho' it was ill, the Court would not quash it till the Issue was tried, that it might be known who ought to repair, and upon the Trial the Jury found quod reparare non debent; but did not find who ought to repair, and therefore it was insisted, that no Judgment could be given. Sed per Curiam, the Judgment shall be, that the Hundred of Yarnnton eat acquieta, and that the other Bills between whom the Issue was, should repair.

1 Vent. 208.
Indictment
for Stopping
a Foot-way to
the Church,
*ad commune
nocumentum*,
good.

(2.) Indictment at the Sessions for Stopping Communem viam pedestrem ad Ecclesiam, ad commune nocumentum, &c. it was objected, that an Indictment would not lie for Stopping a Foot-way to the Church, because it was only a Nulance to the Parishioners, and no more than a Private Damage. Sed per Curiam, it being laid ad commune nocumentum, the Church may be the Terminus ad quem, &c. and the Way may lead farther.

1 Vent. 256.
1 Mod. 112.
How a Parish
must plead if
indicted for
not repairing.

(3.) Where a Parish is indicted for not repairing a Way, they cannot plead Not guilty, and give in Evidence, that such a Person is bound to repair either by Tenure or Prescription, because the Parish is liable de communi jure; but if they would discharge themselves they must plead the Tenure or Prescription.

Sid. 464.
2 Saund. 160.
Where the
Defendant
was charged
ratione tenuræ.

(4.) Presentment in the Sessions by one Justice, that the Highway in Stoke Common was out of Repair, and that Sir N. S. ought to repair it ratione tenuræ of certain Lands, Parcel of the said Common, which he had encroached and enclosed from the Highway, and which Time out of Mind had been Parcel of the Highway, and that he did not repair it ad commune nocumentum, &c. This Presentment being removed into B. R. the Defendant pleaded, that the Inhabitants of Stoke ought to repair it, and traversed, that he ought to repair ratione tenuræ; and upon a Demurrer to this Plea it was objected, that it was ill, because the Defendant had not answered the Encroachment, which was the Principal Matter. Sed per Curiam, the Defendant being charged to repair Ratione tenuræ, that is the Chief Matter to be answered, because if he had been chargeable by Reason of the Encroachment, he ought not to have been charged Ratione tenuræ, for there is a great Difference

ference between the one and the other, because where there is an Encroachment, the Party may lay it open when he will, and then he is no longer chargeable to repair; but where the Charge is *Ratione tenuræ*, he is still bound to repair, tho' he lay it open to the Highway.

(5.) Upon an Indictment for not repairing a Highway, if the Defendant produce a Certificate before the Trial, that the Way is repaired, he shall be admitted to a Fine; but after a Verdict such Certificate will be too late, for then there must be a Constat to the Sheriff, and he ought to return, that the Way is repaired, because the Verdict being a Record, must be answered by Record.

Raym. 215.
Upon an Indictment for not repairing, the Defendant may be admitted to a Fine on a Certificate, that 'tis repaired, but not after a Verdict.
2 Vent. 186.
Where the Plaintiff declared on his Possession, and held good.

(6.) Case, &c. for Stopping a Way, in which the Plaintiff declared, that he was possessed of an ancient Messuage, and had a Foot-way over the Defendant's Ground, as belonging to the said Messuage, & de jure habet, and that the Defendant stopped it: Upon Demurrer to this Declaration it was objected, that it was ill, because the Plaintiff did not prescribe, or otherwise entitle himself to this Way than only by a bare Possession of an House. Sed per Curiam, the Declaration is good, it being no more than a Possessory Action.

(7.) Indictment was found against the Defendant, for that he vi & armis Part of the Highway, leading from Shoreditch to Stoke, &c. postibus & repagulis inclusit: Upon a Trial at Bar the Chief Question was, whether the Place enclosed was an Highway or not. Et per Hale Ch. Just. a Way leading to any Market-Town, and communicating with any great Road, is an Highway; but if it lead only to a Church, or to a House or Village, or to some particular Close, 'tis a Private Way; and that the Parish of Common Right is to repair the Highway, unless particular Persons are obliged by Custom or Prescription, but private Ways are to be repaired by the Village or Hamlet, and sometimes by a particular Person.

1 Vent. 189.
What is an Highway, and what not.

W I L L S.

Fisher *versus* Nicholls. Hill. 12 Will. III. B. R.

Wills are more favourably construed than any other Deed.

(1.) **I**N this Case it was said by Holt Ch. Just. That in Wills the Construction is more favourable to fulfil the Intent of the Testator, than 'tis in Deeds or other Conveyances executed by him in his Life-time; therefore where there is a Gift by Will to W. R. and his Assigns for ever, this is an Estate in Fee; but if by Deed, 'tis no more than an Estate for Life; so if a Gift to W. R. and his Heirs Male, by Will, is an Estate-tail, but by a Deed, 'tis a Fee-simple; so a Devise to his eldest Son and his Heirs, after the Death of the Wife of the Testator, is an Estate for Life to the Wife by Implication, but 'tis not so in a Deed; the Reason of this Difference is not because the Testator is inops Concilii, but because a Will is not a Common Law Conveyance; but by the Statute, 'tis true, there were Wills before the Statute of H. 7. but those were not by Common Law, but by Custom, as in Case of Burgage Lands: Now as Custom enabled Men to dispose their Lands in this Manner by their Wills, and not according to the Rules and Forms in Common Law Conveyances, so it exempted this Kind of Conveyance from the Regularity and Propriety requisite in those Conveyances; and by this Means it came to pass, that Wills by the Statute in Imitation of those by Custom, gained such favourable Constructions.

By the Statute 29 Car. 2. Cap. 3. there is a considerable Alteration made in the Law relating to Wills in Writing; for by that Statute it is enacted, that the Will must be Written in the Life-time of the Testator, and signed by him, or by some other Person in his Presence, and by his Direction; and that the Witnesses shall subscribe their Names in his Presence.

Wit-

Witnesses to Wills.

Davy and Nicholas versus Ann Smith. Pascha

5 Will. III. B. R.

(1.) **U**PON a Trial at Bar, the Question was, whether the Witnesses to a Will had pursued the Directions of the Statute of *Frauds, &c. in subscribing their Names; and it was resolved, that where the Testator lay in a Bed in one Room, and the Witnesses went thro' a small Passage into another Room, and there set their Names at a Table in the Middle of the Room, and opposite to the Door, and both that, and the Door of the Room where the Testator lay, were open, so that he might see them subscribe their Names if he would; and tho' there was no positive Proof that he did see them subscribe, yet that was a sufficient Subscribing within the Meaning of the Statute, because it was possible that the Testator might see them subscribe; and therefore, per Curiam, if the Witnesses subscribe their Names in the same Room where the Testator lies, tho' the Curtains of the Bed are drawn Close, 'tis a good Subscribing within this Statute; because, if 'tis in his Power to see them, and what is done, it shall be construed to be in his Presence.

What shall be a sufficient Subscribing in the Presence of the Testator.

29 Car. 2. cap. 3.

Lea versus Libb. 1 Will. III. B. R.

(2.) **T**HE Testator made his Will in Writing, subscribed by Two Witnesses, and devised all his Lands to W. R. afterwards he made a Codicil, in which his Will was recited; and this also was attested by Two Witnesses, one of which Witnesses was a Witness to the Will, but the other was a new Witness; the Question was, whether this new Witness should make a Third to the Will, the Statute requiring that there should be Three; and adjudged that he should not; 'tis true, here are three Witnesses to the Intent and Will of the Testator, but there are but Two to his Will in Writing; 'tis true likewise, that there are two Witnesses to the Codicil, but those are not Witnesses to the written Will, so that there wants one Witness to the Will in Writing.

Show. 68. 3 Mod. 262. Where Two Witnesses to a Will, and one to a Codicil, doth not make Three Witnesses to that Will.

Witnesses to Wills.

(1.) **B**y the Canon Law, and so likewise by our Law, Two Witnesses are requisite to prove a Will for Goods, and three for Lands; but now by the * Statute 'tis required, that these Witnesses should subscribe their Names in the Presence of the Testator; and since the Making that Statute there have been some remarkable Cases, both as to the Manner and Number of the Witnesses subscribing.

* 29 Car. 2.
cap. 3.

2 Ch. Rep.
109.
Where the
Witnesses
subscribe at
several
Times, 'tis
good.

(2.) And first, as to the Manner of Subscribing: *ff.* The Case was, there were Three Witnesses, but they did not subscribe their Names at the same Time, but severally, at the Request of the Testator, and at several Times, and were not all present at one and the same Time, this was decreed a good Will.

* *Antea* 2.
Where the
Revocation
must be by a
Writing o-
perating as a
Will, or de-
claring an
Intention to
revoke.

(3.) Then, as to the Number of Witnesses, see the Case of * *Lea* and *Libb* last mentioned, and this Case: *ff.* The Testatrix made a Will in Writing, according to the Statute, by which she devised her Lands to one *Petit*, and afterwards by another Will she devised the same Lands to the same Person, and died, but this second Will was defective in the Circumstances of the Witnesses subscribing their Names in her Presence, which they did not, and the Will was held void for that Reason, and by Consequence no Revocation of the first Will, for that must be by a Writing operating as a Will, or by a Writing by which the Testator declares his Intention to revoke the first Will.

Writs, and Writs of Error, of the Teste and Return, &c.

Mason *versus* March. Trin. 11 Will. III.

(1.) **I**n false Imprisonment laid to be in the Vacation, if the Defendant plead a Writ taken out Teste in the Term, per quod he took the Plaintiff, he (the Plaintiff) may reply, that notwithstanding the Teste of the Writ, he took it out in Vacation-Time; for where the Teste of the Writ is in Support of Justice, no Averment shall be made against it: But per Holt Ch. Just. 'tis otherwise where 'tis to justify a Wrong.

No Averment against the Teste of a Writ, when 'tis in Support of Justice.

(2.) The Plaintiff obtained a Judgment, and after a Writ of Error brought, he, (viz.) the Plaintiff, brought an Asson of Debt on that Judgment; the Defendant supposing it was suspended by the Writ of Error, demurred to the Declaration: Sed per Curiam, he can have no Advantage of this Matter upon a Demurrer, he ought to have pleaded it specially, and to pray Judgment if he should be compelled to answer pending the Writ of Error.

2 Vent. 261.
2 Lev. 397.
Debt lies on a Judgment after a Writ of Error brought.

(3.) In a Writ of Error to reverse a Fine, Infancy was assigned for Error, and a Scire facias issued against the Certenants and Cognisee, who plead in nullo est Erratum: Et per Hale Ch. Just. where Error is well assigned (as 'tis in this Case) there in nullo est Erratum amounts to the Confession of the Fact, but where the Error is not well assigned, there in nullo est Erratum amounts to a Demurrer; now in the principal Case the Infancy was well assigned as an Error in Fact, therefore the Defendants ought not to have pleaded in nullo est Erratum, but they ought to have pleaded to Issue upon the Scire facias.

Raym. 231.
Where Error is well assigned, there a Plea in nullo est Erratum is a Confession of the Fact.

(4.) Resolved by the Lords Spiritual and Temporal, that Cases of Appeals and Writs of Error shall continue, and are to be proceeded on in statu quo, &c. as they stood at the Dissolution of the last Parliament, without Beginning again de novo; and like-

Raym. 381.
Appeals and Writs of Error stand good after the Parliament is dissolved.

likewise, that the Dissolution of the last Parliament doth not alter the State of Impeachments brought by the Commons in that Parliament.

WRIT of ERROR.

Collins versus Scevington. Hill. 9 Will. III. C. B.

Where a
Writ of Er-
ror is no *Superfedeas*.

(1.) **T**HE Plaintiff obtained a Judgment for 10 l. the Defendant brought a Writ of Error, supposing the Judgment to be for 20 l. adjudged this was no *Superfedeas*, for Executions are favoured in Law as the Fruits of Men's Actions, and therefore shall not be delayed without apparent Cause, which was not in this Case, because this could not be a Writ of Error upon that Judgment.

Witty versus Polehampton. Mich. 10 Will. III. B. R.

Where the
Judgment is
not suspended
by the
Writ of Er-
ror.

(2.) **W**. R. gave a Warrant of Attorney to confess a Judgment to W. W. as of Trinity-Term, and afterwards to hang up that Judgment, he brought a Writ of Error, Terme 27 June, returnable 12 July following; W. W. the Judgment-Creditor having Notice of this Matter, entered up the Judgment as of the last Day of that Trinity-Term, so that the Writ of Error was returnable before the Judgment was signed; and upon a Complaint to the Court of this Matter, they would do nothing in it, for if it was a Trick, it was an honest one, and to obtain a just Debt: So per Curiam, this Judgment is not suspended by this Writ of Error; aliter if the Return had been after.

Carlton *versus* Mortaugh: Hill. 2 Annæ.

(3.) **W**RIT of Error was brought in B. R. upon a Judgment in C. B. and the Plaintiff in Error assigned the Want of an Original for Error; the Defendant in Error pleaded a Release of all Errors, but laid no Venue, where the Release was made, for which Cause the Plaintiff demurred to the Plea, and in arguing this Demurrer it was admitted, that the Plaintiff could not pray a Certiorari to certify whether there was any Original or not, because the Defendant by his Plea had confessed, that there was none, the Fault being cured by the Release of Errors, and therefore it was doubted whether the Court could award a Certiorari, and without it they could not reverse the Judgment; for where the Plaintiff in Error assigns a good one, and the Defendant pleads an ill Bar, upon which there is a Demurrer, the Court must reverse the Judgment, because the Error is confessed and admitted. Et per Holt, Ch. Just. where a Release of Errors is pleaded by the Defendant, and upon Issue joined 'tis found for the Plaintiff, the Court cannot reverse the Judgment.

¹ Salk. 268. Where the Plaintiff cannot have a Certiorari to certify whether any Original, or not.

Writ of Enquiry.

Pagett *versus* Preston:

(1.) **C**ASE in which the Plaintiff declared upon an Indebitatus Assumpsit, and also on a Bill of Exchange; the Defendant quoad the Bill of Exchange demurred, and said nothing as to the Indebitatus Assumpsit, thinking thereby to make a Discontinuance, if the Plaintiff did not take Judgment by nil dicit, which he omitted, and only joined in Demurrer; afterwards, when the Paper-Book was made up in the Office, the Clerk of the Papers left out these Words, quoad Billam Excambii, and the Cause being put in the Paper Judgment was given for the Plaintiff,

Where a Judgment shall not be set aside after a Writ of Enquiry executed.

and

and a Writ of Enquiry was executed; and now upon a Motion to set aside this Judgment for Irregularity, by omitting these Words, quoad Billam Excambii, Holt Ch. Just. said they came too late, for they should have taken Notice of it when it came into the Paper-Office, and not stay till a Writ of Enquiry was executed; 'tis a Trick, for the Defendant concluded, that the Plaintiff would not take Notice of it on a Demurrer, being a Thing of Course; therefore the Judgment was confirmed.

East *versus* Estington. Mich. 1 Annæ B. R.

1 Salk. 130. (2.) **I**n this Case it was held, that in all Superior Courts the Judge sends his Precept to the Sheriff to enquire of Damages; but in London in all Inferior Courts an Enquest is summoned in Court, and the Court takes the Inquisition of Damages.

1 Lev. 255.
Where the
imperfect
Finding by a
Jury shall
not be supplied by a
Writ of Enquiry.

(3.) In Replevin, the Defendant avowed for Rent Arrear, the Plaintiff replied Non concessit, &c. upon which they were at Issue, and the Jury found the Value of the Cattle taken, but did not find what Rent was in Arrear, so as the Cattle might be sold to satisfy the Rent according to the Statute 17 Car. 2. and it being moved, that this might be supplied by a Writ of Enquiry, as it was in Specott's Case; per Curiam, it was so done in that Case, because the Party might have his Judgment at Common Law; but now, by this Statute 'tis enacted, That the Value of the Rent shall be enquired by the same Jury which tries the Issue, and therefore it cannot be supplied by a Writ of Enquiry.

T H E T A B L E.

A.

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